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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

LARRY WOLLERSHEIM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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December 31, 1986

Question Presented

Where

i. a former member secures a judgment against his Church for thirty million dollars, including twenty-five million dollars as punitive damages, for purported emotional distress arising out of his voluntary participation in the Church's religious practices;

ii. the Church appeals that judgment; and

iii. California law ordinarily requires as a condition of a stay of execution of judgment pending appeal that the Church post a cash bond of sixty million dollars or a surety bond of forty-five million dollars, both of which are many times the Church's assets and would force it into bankruptcy and dissolution

did the refusal of the California Court of Appeal to stay execution or substantially to reduce the amount of the bond violate the petitioner Church's rights under the Religion Clauses of the First Amendment, and to Due Process and Equal Protection under the Fourteenth Amendment?

Parties to the Proceedings Below and Rule 28.1 List

The parties to the proceedings below were:

The Church of Scientology of California
Larry Wollersheim.

Petitioner Church of Scientology of California has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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The Church of Scientology of California petitions for a writ of certiorari to review the order of the Court of Appeal of the State of California, Second Appellate District, in this case.

Opinions Below

The Court of Appeal of the State of California, Second Appellate District, entered an order without an opinion on October 1, 1986, denying a petition for a writ of supersedeas (App. F, *infra*, 9a).[1]

[1] The Court of Appeal of the State of California, Second Appellate District, which denied the petition for a writ of supersedeas, appears to be the highest court which decided the issue before this Court on the merits. Should this Court decide that the order of the Court of Appeal was an act of discretion, it is respectfully requested that the petition be deemed addressed to the trial court, the Superior Court of California, County of Los Angeles.

In denying a petition for review, the Supreme Court of California issued no opinion. Its unreported order of October 6, 1986 contained a dissenting opinion (App. D, *infra,* 7a). The same court's prior order of October 3, 1986 briefly continuing a lower court stay of execution (App. E, *infra,* 8a) is also unreported.

The Superior Court of California, County of Los Angeles, the trial court, made pre-trial rulings, also not reported, that Scientology is a *bona fide* religion entitled to First Amendment protection (App. J, *infra,* 8a, App. K, *infra* 20a) and that the ritual of auditing is a central practice of the religion (App. J, *infra,* 18a). On August 4, 1986, it granted a brief stay of execution in an unreported order (App. H, *infra,* 12a). On September 18, 1986, it denied petitioner's motions for judgment notwithstanding the verdict and for a new trial in an unreported order. On September 26, 1986, it orally denied petitioner's motion to waive the bond necessary to stay execution of the judgment on grounds of lack of power. It also orally denied petitioner's motion to extend the stay of execution.

Jurisdiction

The order of the Supreme Court of California (App. D, *infra,* 7a) was entered on October 6, 1986. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions Involved

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

> thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure §§ 902, 904.1, 917.1 and 923 (West 1980 and Supp. 1986) are reproduced in their entirety in Appendix A to this Petition.

Statement of the Case

The central issue in this case is whether the application of California's bonding requirement for a stay of enforcement of a judgment pending appeal which would financially destroy the petitioner Church and thereby render meaningless its right to appeal from an unconstitutional and otherwise unlawful 30 million dollar judgment violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Thus, it presents many of the same issues which this Court has already deemed worthy of its plenary review in *Pennzoil, Co.* v. *Texaco, Inc., prob. juris. noted,* —— U.S. ——, 106 S.Ct. 3270 (1986), *see infra,* p. 11. Additionally, the issues in this case are even more critical than those in *Texaco* precisely because the underlying judgment rests entirely on the peaceful and voluntary religious practices of the Church, and the resulting imminent destruction of the Church in turn would destroy the religious free exercise rights of its members. The arbitrary denial of its right to appeal from such an uncon-

stitutional judgment by reason of the application of the bonding requirement thus also raises substantial questions under the Religion Clauses of the First Amendment.

The respondent, a former member of the Church of Scientology of California, sued it for the infliction of "emotional distress" and fraud arising primarily from his participation in the Church's central religious practice of auditing.[2] The trial court held that Scientology is a *bona fide* religion entitled to First Amendment protection and that auditing is its central religious practice (App. J, *infra*, 18a-19a).

At the conclusion of the respondent's case, the trial court dismissed his two claims that the Church fraudulently misrepresented the benefits of participation in auditing and failed to disclose the alleged dangerous nature of auditing. Consequently, the only issues for the jury were respondent's two claims for infliction of emotional distress arising primarily from the respondent's voluntary participation in the Church's religious practice of auditing.[3]

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[2] Auditing constitutes the most substantial and important part of every Scientologist's path of spiritual progress. Ordained Church ministers are typically called "auditors" by Church members (literally, "one who listens"). They fulfill roles comparable to those of ministers, rabbis and priests in other religions. In Scientology, an auditor aids a parishioner through individual counselling, assisting him to confront and acknowledge past harmful acts or events in this or previous lifetimes to overcome the effects of those events on the parishioner as a spiritual being. The practice is akin to the confessional of Catholicism and other religions. However, unlike other faiths, spiritual counseling constitutes the central practice of the Scientology religion. In fact, according to the tenets of Scientology, auditing is the sole route to spiritual salvation.

[3] Respondent's cause of action for intentional infliction of emotional distress also asserted that the Church allegedly urged him to sever his ties with friends and family, allegedly had improperly disclosed information revealed in auditing sessions, and allegedly

(footnote continued on following page)

The jury rendered a verdict of five million dollars compensatory damages with no distinction between respondent's claim of intentional infliction of emotional distress (the third cause of action) and respondent's claim of negligent infliction of emotional distress (the fourth cause of action (App. I, *infra,* 16a). The jury awarded twenty-five million dollars as punitive damages on the third cause of action (*Id.*). Judgment was entered on July 22, 1986 (App. I, *infra,* 17a).

California Code of Civil Procedure § 917.1 requires that in order to stay enforcement of the judgment pending appeal, a party must post an undertaking of twice the amount of the judgment, as applied here sixty million dollars, or one and one-half times the amount of the judgment if the undertaking is by an admitted surety insurer (App. A, *infra,* 2a-3a). As applied here, the latter provision requires a forty-five million dollar bond.

On August 4, 1986, the trial court stayed the enforcement of the judgment until October 3, 1986, pursuant to Cal. Civ. Proc. Code § 918 (West Supp. 1986)[4] and provided in its order "that the assets reflected" in a particular financial statement "will not be disbursed . . . except in the ordinary course of business" (App. H, *infra,* 12a).

(footnote continued from previous page)

had destroyed his business by urging his Scientology employees and customers to boycott his business. It is clear, however, and was acknowledged by respondent's counsel and the trial court, that auditing is the central issue and that the damage award can be supported only by the claim concerning auditing, if it can be supported at all.

[4] Section 918 authorizes the trial court to stay enforcement of any judgment, but where, as in this case, enforcement would be stayed on appeal only by the posting of an undertaking, limits the duration of such a stay to not longer than ten days beyond the last date on which a notice of appeal could be filed without the consent of the adverse party.

The trial court further provided for its prior approval of certain expenditures relating to other litigation (App. H, *infra,* 12a-13a).

Subsequently, on September 26, 1986, the trial court denied petitioner's motion pursuant to Cal. Civ. Proc. Code § 995.240 (West Supp. 1986) to waive the statutory requirements to stay execution pending appeal on the ground of lack of power and denied petitioner's motion to extend the stay of execution of judgment. Petitioner had established that its net worth on September 15, 1986 was just over thirteen million dollars of which approximately five million dollars was unpledged and available to secure an undertaking on appeal.[5] Hence, it was financially impossible for petitioner to post a bond of 60 million dollars. Petitioner also showed that it was impossible for it to obtain a surety bond for 45 million dollars because no surety company would make such an undertaking without petitioner's posting at least one hundred percent collateral.[6]

Petitioner filed its notice of appeal to the California Court of Appeal, Second Appellate District, on September 29, 1986 (App. G, *infra,* 10a). Petitioner then sought relief from the bonding requirements by filing a Petition

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[5] The financial statement submitted to the trial court was attached as Appendix G to petitioner's application to Circuit Justice O'Connor for a stay. Appendix G to Application for Stay of Execution of State Court Judgment Pending Consideration of Petition for Writ of Certiorari, or in the Alternative, Pending Appeal of State Court Judgment and Ultimate Petition for Writ of Certiorari, *Church of Scientology of California* v. *Wollersheim,* No. A-271.

[6] *See* Supplemental Declaration of Lynn Farney dated September 26, 1986, which was lodged with this Court on October 14, 1986 pursuant to the Circuit Justice's request as Tab 3 to the Appendix to the Petition for Writ of Supersedeas or Other Appropriate Stay Order in the California Court of Appeal, Second Appellate District.

for Writ of Supersedeas or Other Appropriate Stay Order in that court pursuant to Cal. Civ. Proc. Code § 923[7] (West 1980) which was denied without explanation on October 1, 1986 (App. F, *infra,* 9a). In its petition, petitioner had asserted its entitlement to a writ staying enforcement or reducing the undertaking under California law, under the First Amendment and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

On October 2, 1986, petitioner filed a petition for review and request for immediate stay of execution with the Supreme Court of California, seeking review of the denial by the Court of Appeal. On October 3, 1986, the Supreme Court of California continued the stay ordered on August 4, 1986 by the Superior Court pending final determination of the petition for review (App. E, *infra,* 8a). The Supreme Court of California denied review and a stay on October 6, 1986, giving no reason or explanation (App. D, *infra,* 7a). Two Justices (Mosk, J. and Grodin, J.) dissented stating "that the petition for stay should be granted as to punitive damages only." (*Id.*)

Subsequent to the action of the California Supreme Court, petitioner filed with Associate Justice Sandra Day O'Connor, Circuit Justice for the Ninth Circuit, an application for a stay pending consideration of a writ of certiorari to be filed in this Court or pending appeal of the state court judgment and ultimately, if necessary, a petition in this Court for a writ of certiorari. *Church of Scien-*

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[7] Under Cal. Civ. Proc. Code § 923, supersedeas lies to stay execution of judgment without statutory undertaking when (a) an appellant will otherwise suffer irreparable injury and a stay is necessary to preserve the issues on appeal; (b) an appellant has a meritorious appeal; and (c) respondent will not be unduly prejudiced by the relief granted. *See e.g., Davis* v. *Custom Component Switches, Inc.*, 13 Cal. App.3d 21, 27-28, 91 Cal.Rptr. 181 (2d Dist. 1970) *cert. denied*, 409 U.S. 1077 (1972).

tology of California v. *Wollersheim*, No. A-271. The Circuit Justice granted a temporary stay on October 8, 1986, continuing in effect the trial court's supervisory order over the petitioner's assets (App. C, *infra*, 6a). Subsequently, the Circuit Justice referred the stay application to the full Court and on November 3, 1986 the Court granted the stay and continued the Circuit Justice's order of October 8, 1986 pending the timely filing and disposition of a petition for certiorari (App. B, *infra*, 5a).[8]

Reasons for Granting the Writ

1. The orders of the California Court of Appeals and of the Supreme Court of California denying petitioner a stay of execution of judgment or a meaningful reduction in the bonding requirement necessary to stay execution are in direct conflict with principles established by this Court holding that once a state creates a right to an appeal, it may not condition that right upon the ability of an appellant to meet financial or fee requirements. *Evitts* v. *Lucey*, 469 U.S. 387, 393-94 (1985); *Griffin* v. *Illinois*, 351 U.S. 12, 17-20 (1956).

The denial of a stay or of a meaningful reduction of bond by California's appellate courts does precisely what these cases prohibit: petitioner's right to an appeal is rendered meaningless for it cannot meet the requirements for a stay pending appeal. Before it is able to obtain an adjudication of the merits of its appeal, it will be forced

[8] In the stay application, petitioner represented that it was prepared, if absolutely necessary, to post a cash bond of 5.1 million dollars, that being the total net unpledged assets of the Church. Such a bond would provide full security for the compensatory portion of the judgment. Petitioner stands ready to post such a bond if deemed necessary by the Court.

into bankruptcy and perhaps dissolution. At that point, a decision on its appeal[9] will be meaningless for petitioner will no longer exist.

California has granted petitioner a right to appeal, Cal. Civ. Proc. Code §§ 902, 904.1 (West 1980, Supp. 1986), and it is beyond debate under this Court's decisions that this right of appeal, like other state-granted entitlements cannot "be withdrawn without consideration of applicable due process norms." *Evitts* v. *Lucey, supra,* 469 U.S. at 400-01. *Accord, Williams* v. *Oklahoma City,* 395 U.S. 458, 459-60 (1969); *Griffin* v. *Illinois,* 351 U.S. 12, 17-20 (1956). *See also Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422, 429-30 (1982).

Having created this right to appeal, California must afford petitioner, like every other litigant, "a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts, supra,* 469 U.S. at 405. It may not deprive petitioner of this fair opportunity by reducing the appeal to a "'meaningless ritual' by denying [petitioner] the means effectively to press [its] appellate arguments. . . ." *Texaco, Inc.* v. *Pennzoil Co.,* 784 F.2d 1133, 1154 (2nd Cir. 1986), *prob. juris.* noted, —— U.S. ——, 106 S.Ct. 3270 (1986), quoting *Douglas* v. *California,* 372 U.S. 353, 358 (1963). As the Court of Appeals for the Second Circuit aptly recognized in the *Texaco* case concerning a nearly identical issue, the right to a meaningful appeal cannot be rendered illusory by the application of substantial bonding requirements which an appellant cannot meet:

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[9] Petitioner is expeditiously pursuing its appeal on the merits in the California state courts and expects to file its appellate brief in early January, 1987. Copies of the brief on the state court appeal will be lodged in this Court shortly thereafter.

> It is self-evident that an appeal would be futile if, by the time the appellate court considered his case, the appeal had by application of a bonding law been robbed of any effectiveness. *Cf. National Socialist Party* v. *Skokie,* 432 U.S. 43, 44 . . . (1977); *Nebraska Press Ass'n.* v. *Stuart,* 423 U.S. 1319, 1324-25 . . . (1975) (Blackman, J., in chambers); *Times-Picayune Pub. Corp.* v. *Schulingkamp,* 419 U.S. 1301, 1305 . . . (1974) (Powell, J., in chambers); *Graves* v. *Barnes,* 405 U.S. 1201, 1203 . . . (1972) (Powell, J., in chambers).

784 F.2d at 1154.

Accordingly, the Court of Appeals in *Texaco* approved federal court intervention in a pending state civil proceeding to stay execution of a judgment where the state bonding requirements effectively would have rendered meaningless an appeal from that judgment:

> The undisputed facts indicate that the automatic enforcement of the Texas lien and bond requirements against Texaco's property to the extent of $12 billion lacks any rational basis, since it would destroy Texaco and render its right to appeal in Texas an exercise in futility. This would at least amount to a deprivation of its property in violation of its right to due process under the Constitution.

Texaco, supra, 784 F.2d at 1145.[10]

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[10] In the *Texaco* case, the State of California submitted a brief *amicus curiae* to the Second Circuit supporting the granting of injunctive relief to protect the right of appeal. Most significantly, the brief, written by California's Attorney General, states:

> It is well established that while a state is not required to provide any right of appeal . . ., once such a right is provided it may not be conditioned in a discriminatory or arbitrary manner. . . .

(footnote continued on following page)

This Court has noted probable jurisdiction over the *Texaco* case, *Pennzoil Co.* v. *Texaco, Inc.*, —— U.S. ——, 106 S.Ct. 3270 (1986), and will hear oral argument this Term. The *Texaco* case, of course, is complicated by substantial issues of federal jurisdiction and comity which are not present here.[11] It is significant, however, that the *Texaco* case involves the same underlying due process and equal protection questions which are posed here, *see* Jurisdictional Statement at 23-26, *Pennzoil Co.* v. *Texaco, Inc.*, No. 85-1798, and this Court's grant of probable jurisdiction did not restrict the issues. Thus, this Court will consider in the *Texaco* case this Term the very issues petitioner raised in the California state courts, and is raising in this petition for certiorari. *See* Brief for Appellant in the *Texaco* case, at 45-50.[12]

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> [T]he court is confronted with a statute whose application in this unprecedented case works a fundamental injustice. The unique characteristics of this case are . . . (3) substantial questions regarding whether the full amount of the judgment of the trial court will be sustained on appeal; and (4) a state law which if fully applied would foreclose an appeal or cause bankruptcy of the corporation. Under these circumstances, amicus suggests that basic notions of fairness favor mitigating operation of the bond-posting requirement in this instance.

Brief of Amicus Curiae State of California, Acting By and Through Its Business, Transportation and Housing Agency in Support of Respondents at 3-4, *Texaco, Inc.* v. *Pennzoil Co.*, *supra*, 784 F.2d 1133.

[11] We note that the course followed by petitioner here, *i.e.*, the exhaustion of state remedies followed by review in this Court, is precisely that asserted by appellant Pennzoil Company in this Court to be the proper course. *See* Brief of Appellant at 9-10, 36-37 in *Pennzoil Company* v. *Texaco, Inc.*, No. 85-1798.

[12] The Court may wish to defer ruling on this petition for certiorari until after the *Texaco* case is decided. This case, however, presents a stronger case for review than *Texaco* in that it presents a double bond requirement, no concerns of federalism and comity, and a direct threat to First Amendment rights.

While this case presents much the same legal issues as *Texaco,* there are two distinguishing facts which make the denial of a stay of execution here more arbitrary and irrational. First, *Texaco,* at least in theory if not in practical effect, had an adequate net worth to meet the bonding requirement, 784 F.2d at 1155, whereas here the required surety bond is 3½ times petitioner's net worth and the required cash bond is approximately 4½ times petitioner's net worth.[13] Second, the California bonding scheme requires either a cash bond of *twice* the judgment or a surety bond of one and one-half the judgment in contrast to the Texas scheme which requires a bond in at least the full amount of the judgment. *See* 784 F.2d at 1138.

A result similar to that in *Texaco* was reached several years earlier by the Fifth Circuit in *Henry* v. *First National Bank of Clarksdale,* 595 F.2d 291 (5th Cir. 1979) *cert. denied,* 444 U.S. 1074 (1980). In that case, the NAACP sought federal court injunctive relief against a Mississippi bonding requirement that effectively would have prevented the NAACP from prosecuting an appeal from a Mississippi state court judgment for damages and injunctive relief. Either posting the required bond of 125% of the judgment or execution of the $1.25 million judgment would have effectively bankrupted the NAACP bringing all of its activities "to an immediate and indefinite halt" and "would have entailed the virtual disappearance of the NAACP as a functional entity" 595 F.2d at 305. The Court of Appeals for the Fifth Circuit upheld the district court's injunction not only to preserve the NAACP's due process right to pursue its appeal, but also to prevent irreparable

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[13] Relative to petitioner's unpledged assets of approximately 5 million dollars, the required surety bond is approximately 9 times its unpledged assets and the required cash bond is approximately 12 times its unpledged assets.

harm to the organization's rights of speech and association which were threatened by the pending judgment and threatened execution.

Petitioner's plight is at least as compelling as that of the NAACP in *Henry*. First, the First Amendment religious freedoms at stake here are as important as the First Amendment rights to political speech and association which concerned the Fifth Circuit in *Henry, supra,* 595 F.2d at 303-05. Second, as the district court in *Henry* recognized, it was possible for the NAACP to obtain a supersedeas bond, although to do so it would have been required to borrow substantial funds and to deplete funds necessary for its normal functions. *Henry* v. *First National Bank of Clarksdale,* 424 F.Supp. 633, 638-39 (N.D. Miss. 1976). Here, in the absence of some meaningful relief from the bonding requirements, petitioner will cease to exist. The bonding requirements cannot be met and execution against petitioner's assets will force it into bankruptcy and dissolution.

The denials of a stay and of a meaningful reduction of the bond requirement in this case stand in stark contrast to the decisions of this Court and of the United States Courts of Appeals for the Second and Fifth Circuit in *Texaco* and *Henry*. Those decisions reflect and mandate a realistic and sensitive assessment of the practical effect of barriers to a meaningful appeal under the Due Process Clause of the Fourteenth Amendment. The unexplained and indeed inexplicable adherence to the California statutory requirements requiring either a sixty million dollar or forty-five million dollar bond where petitioner has a net worth of only 13 million dollars, of which only 5 million dollars is unpledged, erects an insurmountable barrier to a meaningful appeal.

The effect of the deprivation which will occur here is all the more serious because it is a Church which will be severely crippled or destroyed by a judgment of questionable constitutionality and the award of massive damages, including twenty-five million dollars in punitive damages, for a former member's voluntary participation in peaceful religious practices. If petitioner can be crippled or destroyed before it has a fair opportunity for a meaningful appeal, all Scientology churches in particular and indeed all other churches, but especially those which adhere to minority religious views, will be chilled from carrying out their essential religious functions: the proselytizing of their religions and the offering of their religious practices.

2. The arbitrary and irrational nature of this insurmountable barrier, and the Due Process violation here, is exacerbated because sensitive and important issues are to be appealed.[14] Respondent, a former member of the petitioner Church, invoked the aid of a civil tribunal to recover damages for wrongs allegedly committed by his Church in the course of its central religious practice of auditing. Numerous decisions of this Court have recognized that lawsuits such as the underlying action which seek to resolve in civil courts disputes between churches and their members over religious practices are not justiciable. *See Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952); *United States* v. *Ballard*, 322 U.S. 78, 87 (1944); *Prince* v. *Massachusetts*,

[14] By emphasizing the substantial federal constitutional issues at stake here, petitioner does not mean to understate the substantial state law reasons which require reversal. For example, the damage award should be reversed because there was an insufficient showing to even submit the case to a jury and the amount is clearly excessive. The point, of course, is that in order to make any appellate decision meaningful, whether it be on federal constitutional grounds or state law grounds, petitioner must be allowed to survive until its appeal has been resolved.

321 U.S. 158, 177, 178 (1944) (Jackson, J., concurring and dissenting on other grounds); *Watson* v. *Jones*, 80 U.S. (13 Wall) 679, 730 (1872). Accordingly, numerous federal and state courts—including those in California—have rejected claims such as respondent's when made by former members against their Church. *See Baumgartner* v. *First Church of Christ, Scientist*, 141 Ill. App.3d 898, 490 N.E. 2d 1319 (1st Dist. 1986) *cert. denied*, —— U.S. ——, 107 S.Ct. 317 (1986); *Meroni* v. *Holy Spirit Ass'n.*, 119 A.D. 2d 200, 506 N.Y.Supp. 2d 174 (2d Dept. 1986) *appeal filed* (October 2, 1986); *Molko* v. *Holy Spirit Ass'n.*, 179 Cal. App.3d 450, 224 Cal. Rptr. 817 (1st Dist. 1986) *review granted* —— Cal.3d ——, 228 Cal. Rptr. 159 (1986);[15] *Lewis* v. *Holy Spirit Ass'n.*, 589 F.Supp. 10, 12 (D. Mass. 1983); *Christofferson* v. *Church of Scientology of Portland*, 57 Or.App. 203, 644 P.2d 577 (Or.App. 1982) *petition denied*, 293 Or. 456, 650 P.2d 928 (1982) *cert. denied*, 459 U.S. 1206, 1227 (1983). And it is, of course, because states such as California recognize that trial courts do err and that trial court adjudication carries a "risk of erroneous deprivation", *see Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976), that the state provides access to the appellate courts to provide for review of errors such as occurred upon the trial of this case.

Moreover, the Due Process violation is further exacerbated by the inclusion in the judgment of twenty-five mil-

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[15] The decision in *Molko* rests squarely on the principle that the First Amendment bars judicial imposition of tort liability for the alleged psychological effects of voluntary participation in peaceful religious practices. If the Supreme Court of California affirms that decision, the state appellate courts will presumably reverse the judgment in this case. If the Supreme Court of California reverses the *Molko* decision, then there is a reasonable probability in light of the various decisions cited in the text, that this Court would grant *certiorari* to review either that case and/or this case to resolve the conflict and settle the important constitutional issue involved.

lion dollars, or five times the compensatory damages, as punitive damages. This Court has recognized that punitive damages by definition "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979) quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Equally, this Court has recognized and warned against the danger that punitive damages may be a means of punishing minority views, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), and described as "important issues which, in an appropriate setting must be resolved" claims "that a $3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing punitive damage awards . . . violates the Due Process Clause of the Fourteenth Amendment." *Aetna Life Insurance Co.* v. *Lavoie*, —— U.S. ——, 106 S.Ct. 1580, 1589 (1986). *See also Jeffries, A Comment On The Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147-158 (1986).

This Court has prohibited awards of punitive damages where their imposition is inconsistent with important social and public policy interests. *See International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979) (no punitive damages against labor unions in unfair representation action); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) (no punitive damages against municipalities in Section 1983 actions). Equally, if not more so, the assessment of punitive damages against a religious organization for providing peaceful and voluntary religious practices creates a danger of the selective destruction of the religious organization and of the underlying values which protect *all* religions. *See e.g., International Brotherhood*

of Electrical Workers v. *Foust, supra*, 442 U.S. at 50 n.14; *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The imposition of such damages, particularly in as shockingly large an amount as here, runs afoul of the Establishment and Free Exercise Clauses, necessarily involves excessive state entanglement with religion and severely chills religious practices and expression.

3. The application of the California statutory scheme to petitioner and the denial of a stay pending appeal or a meaningful reduction in the bond requirements also violate the Equal Protection Clause. As the decisions of this Court hold, "[d]ue process and equal protection principles converge in the Court's analysis in these cases." *Evitts* v. *Lucey, supra*, 469 U.S. at 403 quoting *Bearden* v. *Georgia*, 461 U.S. 660, 665 (1983). Here, the bonding requirement creates two classes without any rational basis for doing so. Appellants who have the wherewithal to post bonds of twice the judgment or to obtain a surety bond of one and one-half times the judgment can obtain a stay of enforcement pending appeal; appellants such as petitioner for whom it is financially impossible to meet either alternative are denied a stay. The consequences of the distinction between the two classes are dramatically illustrated here: petitioner's right to a meaningful appeal and indeed its very existence is immediately threatened because of its financial inability to post a bond. Were it able to meet the bonding requirements, it would not be threatened and could pursue its appeal confident that the merits of the appeal would be resolved and that it would still exist at the time of appellate decision. Instead, unlike a defendant with greater assets, the appeal will become a meaningless exercise.

It is difficult to imagine any rational basis for the distinction as applied in this case; it is also difficult to claim

that a bond of twice or one and one-half times the judgment is needed for the protection of any state interest. In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) a majority of this Court found a statute, non-discriminatory on its face, unconstitutional as applied under the Equal Protection Clause because it terminated "potentially meritorious claims" without a "rational" state interest. 455 U.S. at 439-40, 442 (Blackman, J., concurring); *id.* at 443-44 (Powell, J., concurring). In *Lindsey* v. *Normet*, 405 U.S. 56 (1972) this Court found unconstitutional on its face, under the Equal Protection Clause, a double bond requirement applicable only to a certain class of cases stating that it did not question reasonable procedural rules to safeguard litigated property or to discourage patently insubstantial appeals, "if these rules are reasonably tailored to achieve these ends and if they are uniformly and non-discriminatorily applied." 405 U.S. at 78. The Court also observed that "the double-bond requirement heavily burdens the statutory right . . . to appeal." 405 U.S. at 77. *See also Patterson* v. *Warner*, 415 U.S. 303, 303-04 (1974) (provision requiring double bond as condition for appeal "appeared to present a significant issue, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment . . . .")

Here, the double bond or one and one-half bond requirement for staying execution pending appeal more than heavily burdens the statutory right to appeal—it makes the right futile for petitioner, which is financially unable to meet the requirements.[16]

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[16] The essence of petitioner's argument here is its inability to post any bond beyond that of its unpledged assets. However, it is not without significance that California's statutory double the judgment bond is unusually high in state appellate systems. When this requirement, as here, is predicated upon an award of punitive damages which, by definition, are not needed to compensate the respondent, the equal protection argument is even stronger.

CONCLUSION

The petition for certiorari should be granted for the reasons stated above.

Dated: December 31, 1986

Respectfully submitted,

/s/ LEONARD B. BOUDIN

LEONARD B. BOUDIN
Counsel of Record

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Counsel for Petitioner

APPENDICES

APPENDIX A

Statutes Involved

The relevant provisions of the California Code of Civil Procedure are as follows:

§ 902. Appeal by party aggrieved; appellant and respondent defined

Any party aggrieved may appeal in the cases prescribed in this title. A party appealing is known as an appellant, and an adverse party as a respondent.

§ 904.1. Superior courts; appealable judgments and orders.

An appeal may be taken from a superior court in the following cases:

(a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivisions (h) and (i), (2) a judgment of contempt which is made final and conclusive by Section 1222, (3) a judgment on appeal from a municipal court or a justice court or a small claims court, or (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition upon petition for an extraordinary writ.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(d) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(e) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(f) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(g) From an order appointing a receiver.

(h) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(i) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(j) From an order or decree made appealable by the provisions of the Probate Code.

§ 917.1. Appeal from money judgment; undertaking to stay enforcement; amount; payment by surety; subrogation

(a) The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for money or directs the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action, unless an undertaking is given.

(b) The undertaking shall be on condition that if the judgment or order or any part of it is affirmed or the appeal is withdrawn or dismissed, the party ordered to pay shall pay the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed, as entered after the receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs which may be awarded against the appellant on appeal. This section shall not apply in cases where the money to be paid is in the actual or constructive custody of the court; and such cases shall be governed, instead, by the provisions of Section 917.2. The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order. The liability on the undertaking may be enforced if the party ordered to pay does not make the payment within 30 days after the filing of the remittitur from the reviewing court.

(c) If a surety on the undertaking pays the judgment, either with or without action, after the judgment is affirmed, the surety is substituted to the rights of the creditor and is entitled to control, enforce, and satisfy the judgment, in all respects as if the surety had recovered the judgment.

§ 923. Power of reviewing court to stay proceedings, issue writ of supersedeas, suspend or modify injunction, etc., not limited by chapter provisions

The provisions of this chapter shall not limit the power of a reviewing court or of a judge thereof to

stay proceedings during the pendency of an appeal or to issue a writ of supersedeas or to suspend or modify an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction.

APPENDIX B

Order Dated November 3, 1986

SUPREME COURT OF THE UNITED STATES

No. A-271

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Applicant,

v.

LARRY WOLLERSHEIM

ON CONSIDERATION of the application for stay presented to Justice O'Connor and by her referred to the Court,

IT IS ORDERED by this Court that the said application be, and the same is hereby, granted and the order entered by Justice O'Connor on October 8, 1986, is continued pending the timely filing and disposition of a petition for writ of certiorari.

November 3, 1986

Justice Brennan took no part in the consideration or decision of this order.

A true copy JOSEPH F. SPANIOL, JR.
Test:

Clerk of the Supreme Court of the United States

By /s/ FRANCIS J. LORSON
Chief Deputy

APPENDIX C

Order Dated October 8, 1986

SUPREME COURT OF THE UNITED STATES

No. A-271

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Applicant,

v.

LARRY WOLLERSHEIM

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the execution and enforcement of the judgment of the Superior Court of California, County of Los Angeles, case No. C 332 027, entered July 22, 1986, is stayed, and the order of the Superior Court of California, County of Los Angeles, case No. C 332 027, entered August 4, 1986, is continued pending receipt of a response to the application due on or before Tuesday, October 14, 1986 at noon and further order of the undersigned or of the Court.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 8th
day of October, 1986.

A true copy JOSEPH F. SPANIOL, JR.
Test:

Clerk of the Supreme Court of the United States

By /s/ FRANCIS J. LORSON
Chief Deputy

APPENDIX D

Order

(Filed October 6, 1986)

2/7 No. B023193

IN THE

SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

WOLLERSHEIM

v.

CHURCH OF SCIENTOLOGY OF CALIFORNIA

BIRD, C.J. DID NOT PARTICIPATE.

Application for stay and petition for review DENIED.

Mosk, J. and Grodin, J., are of the opinion that the petition for stay should be granted as to punitive damages only.

/s/ BROUSSARD
Acting Chief Justice

APPENDIX E

Order

(Filed October 3, 1986)

No. 2/7 BO23193

IN THE

SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

WOLLERSHEIM,

Respondent

v.

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Appellant

BIRD, C.J. DID NOT PARTICIPATE.

Pending final determination of the petition for review filed herein, the stay heretofore ordered on August 4, 1986, in Wollersheim v. Church of Scientology, by the Los Angeles County Superior Court, in case No. C332 027, is hereby continued in full force and effect.

/s/ BROUSSARD
Acting Chief Justice

APPENDIX F

Order

(Filed October 1, 1986)

IN THE

COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION SEVEN

No. B023193

(Super. Ct. No. C332027)

(Ronald E. Swearinger, Judge)

LARRY WOLLERSHEIM,

Plaintiff and Respondent,

v.

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Defendant and Appellant.

ORDER

THE COURT*:

The court has read and considered the petition for writ of supersedeas filed herein September 29, 1986. The petition is denied.

/s/ LILLIE /s/ THOMPSON /s/ JOHNSON

*LILLIE, P.J., THOMPSON, J., JOHNSON, J.

APPENDIX G

Notice of Appeal

(Filed September 29, 1986)

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Attorneys for Defendant, CHURCH OF SCIENTOLOGY OF CALIFORNIA

SUPERIOR COURT
OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

No: C 332 027

LARRY WOLLERSHEIM,

Plaintiff,

vs.

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Defendant.

NOTICE OF APPEAL

Church of Scientology of California, Defendant, appeals to the Court of Appeal of the State of California, Second

Appendix G—Notice of Appeal

District, from the Judgment entered on July 22, 1986, (hereinafter "Judgment") and from the Order entered on September 18, 1986 by Los Angeles County Superior Court Judge Ronald E. Swearinger denying Defendant's Motion for Judgment Notwithstanding the Verdict. The appeal from the Judgment seeks review of the verdict, the judgment and all intermediate rulings, proceedings, orders and decisions which involve the merits or necessarily affect the Judgment or which substantially affect the rights of the Defendant, including but not limited to the Order entered on September 18, 1986 by Los Angeles County Superior Court Judge Ronald E. Swearinger denying Defendant's Motion for New Trial.

Notice of entry of such Judgment was served on the Defendant by counsel for Plaintiff on July 24, 1986. Attorney for Plaintiff is Charles B. O'Reilly, 816 S. Figueroa Street, Los Angeles, California 90017.

DATED: September 29, 1986

Respectfully submitted,

PETERSON & BRYNAN
By: /s/ JOHN G. PETERSON
JOHN G. PETERSON
Attorneys for Defendant Church of Scientology of California

APPENDIX H

Order Dated August 4, 1986

(Filed August 4, 1986)

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
No: C 332 027

LARRY WOLLERSHEIM,

Plaintiff,

VS.

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
A Corporation; et al.,

Defendant.

Pursuant to CCP § 918, the Court hereby stays enforcement of the judgment in this case until October 3, 1986, provided that during the period of said stay, the assets reflected in the financial statement admitted into evidence during the testimony of Lynn Farny will not be disbursed, disposed of, expended, transferred or conveyed without prior approval of this Court, except in the ordinary course of business. As to whether or not any expenditure is not in the ordinary course of business, defendant shall submit to this Court in camera, prior to making any expenditure by way of settlement of legal actions pending against the defendant, a statement, under penalty of perjury, as to

the amount claimed to be necessary to effect such settlement and shall not make such disbursement without leave of this Court, which leave shall not be unreasonably withheld.

DATED: August 4, 1986

RONALD E. SWEARINGER, Judge
HONORABLE RONALD SWEARINGER

APPENDIX I

Minute Order Dated July 22, 1986

Date JULY 22, 1986

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF LOS ANGELES

HONORABLE RONALD E. SWEARINGER Judge

Y. JOHNSON Deputy Sheriff

A. CARRASCO Court Attendant

C. BUTER Deputy Clerk

J. EKERLING/C. LAMPKIN, Reporter

(Parties and counsel checked if present)

C 332 027

LARRY WOLLERSHEIM

VS

CHURCH OF SCIENTOLOGY OF CALIFORNIA, et al.,

Counsel for Plaintiff
CHARLES O REILLY√
LETA SCHLOSSER√

Counsel for Defendant
EARLE COOLEY√

NATURE OF PROCEEDINGS:

CIVIL TRIAL (J) FRAUD/AO

Jury deliberations continued from July 21, 1986, resumes with all jurors present as heretofore.

Appendix I—Minute Order Dated July 22, 1986

At 9:10 AM the jury resumes deliberating.

At 11:45AM the jury recesses for lunch.

At 1:30 PM the jury resumes deliberating.

OUT OF THE PRESENCE JURY:

Court and counsel confer re jury question. The Court advises counsel that the jurors are requesting that their jury notebooks and voir dire questionaires be returned to them. The jury request is discussed between the Court and counsel and the Court rules as follows:

Counsel are directed to return their set of the jury questionnaires to the Clerk to be placed in the court file.

Further, the Clerk and Court Attendant (Antoinette Carrasco) are directed to destroy all of the juror notebooks by taking them all to the Exhibit Room and by using the paper thrasher.

With Court and counsel present at 3:10 PM the jury enters the court room with the following verdict:

TITLE OF COURT AND CAUSE

We, the jury in the above entitled action, find with regard to Intentional Infliction of Emotional Distress did the plaintiff, Lawrence Dominick Wollersheim, discover or should he have discovered the facts which he alleges constituted Intentional Infliction of Emotional Distress before July 28, 1979/?

YES OR NO ×
(Please Check One)

Dated: July 22, 1986

Andre A. Anderson
Foreman

Appendix I—Minute Order Dated July 22, 1986

TITLE OF COURT AND CAUSE

We, the jury in the above entitled action, find for the plaintiff, LAWRENCE DOMINICK WOLLERSHEIM, and against the Defendant, CHURCH OF SCIENTOLOGY OF CALIFORNIA as follows:

(CHECK APPOPRIATE BOX)

A) On the Third Cause of Action (Intentional Infliction of Emotional Distress) X

B) On the Fourth Cause of Action (Negligent Infliction of Emotional Distress) X ;

We assess compensatory damages in the sum of $5,000,000.00
(Fill In Amount)

We assess punitive damages as to the Third Cause of Action (Intentional Infliction of Emotional Distress) in the sum of $25,000,000.00;
(Fill In Amount)

We do not assess punitive damages as to the Third Cause of Action (Intentional Infliction of Emotional Distress) ---------- .

Dated: July 22, 1986 Andre A. Anderson
Foreman

The jury is polled. All jurors answer "Yes" to all issues of the verdict. The Clerk records the verdict.

The jury is thanked and excused.

The Court makes the following orders:

Regarding the juror notebooks all 73 will be destroyed in the paper thrasher. (The following is a break down of the juror notebooks)

Appendix I—Minute Order Dated July 22, 1986

Juror	Number Books
#1	5
#2	6
#3	5
#4	6
#5	2
#6	2
#7	4
#8	6
#9	4
#10	5
#11	6
#12	6
Alternate 1	2
Alternate 2	6
Alternate 3	4
Alternate 4	4

Further, the Court makes an order sealing the following:

1) Plaintiff's exhibits 70 through 79 as described on the exhibit receipt and as listed in the minute order of March 12, 1986.

2) The Pre-Clear files of the plaintiff are ordered sealed until further order of the Court.

3) The copy of the Deposition of Edward Walters is again ordered resealed until further order of the Court.

The Verdicts, the Judgment on the Verdict and the instructions, Given, Refused and Withdrawn are filed.

Minutes Entered
7-22-86
County Clerk

APPENDIX J

Excerpt From October 21, 1985 Transcript of Proceedings

Excerpt From October 21, 1985 Transcript of Proceedings in Wollersheim v. Church of Scientology of California, No. C332 027, at 204-05

(Super. Ct. Cal.)

THE COURT: Let me tell you what I plan to do anyway. Why don't you have a seat and I will tell you what I plan to do.

The Founding Church and other cases tell us that while belief is protected, acts or action may not be. And that contention is made in a number of cases. It is mentioned in the Founding Church opinion. We are not starting here from scratch.

We talked at some length last week about the fact that it is a given in this case right now because of decisions made before this trial commenced. Scientology is a religion.

And it is also a fact that auditing is a central activity or function in the religion. That is discussed in the Founding Church case.

I know that one of the concerns of the plaintiff, for example, is the cost that is imposed upon adherence of the Church for auditing. But that is mentioned in the Founding Church case.

That point is made and that did not deter the United States Court of Appeal for the District of Columbia from finding that auditing is a central practice of Scientology.

Appendix J—Excerpt From October 21, 1985 Transcript of Proceeding

What I propose to do—in fact, what I am going to do—and I don't want to hear any more arguments about this. There comes a time when I have heard enough, and I have read enough and I am just going to rule and we are going to proceed—is to grant the defendants' motion as to items 1, 2, 3. Those portions of the motion are granted.

* * *

APPENDIX K

Excerpt From June 14, 1985 Transcript of Proceedings

Excerpt From June 14, 1985 Transcript of Proceeding in Wollersheim v. Church of Scientology of California, No. C332 027 at 4

(Super. Ct. Cal.)

THE COURT:

• • •

My tenative [sic] views with respect to the summary judgment and summary adjudication of issues are these: I think I should grant number five. Scientology is a religion. I think the moving papers sufficiently establish that. I have no separate statement presented by the opposition as required by Section 437c. And as to the extent that factual matters are invoked, as I believe they are, with respect to that issue, any controverting should be by a separate statement with the appropriate citations as required by the code. That's not done.

The supporting documents for the proposition that Scientology is a religion do more than make a prima facie case; they make a strong case. And I am satisfied, based on the posture of what I have, and I am referring particularly to the declaration of Mr. Flinn, that number five should be granted. My tenative [sic] view is that all the others should be denied.

• • •

APPENDIX L

Minute Order Dated June 14, 1985

DATE June 14, 1985

HONORABLE Norman L. Epstein

C. Lee Deputy Clerk
C. Bell Reporter

(Parties and counsel checked if present)

C 332 027

Larry Wollersheim

vs

Church of Scientology of
California, et al.,

Counsel for Plaintiff
Leta St. Clair Schlosser√
Charles B. O'Reilly√
Steve Wilson√

Counsel for Defendant
Taylor, Roth & Bush
Robert Kropp Jr.√
Harrison W Hertzberg√
Eric M Lieberman√

NATURE OF PROCEEDINGS.

Motion of defendant Church of Scientology of California for summary Judgment or,
alternatively, for summary adjudication of issues

1) Court rules on evidentiary objections as reflected in the reporter's notes.

Appendix L—Minute Order Dated June 14, 1985

2) The motion is timely

3) Court denies summary judgment. Of the summary adjudication of issues, Court grants #5 and denies all others. Each of the others asks the Court to rule that conduct of defendant *as alleged* is not actionable. This requires that moving party negative these claims—ie. show that the factual statements are untrue—or establish that a basis of relief is not stated even if they are factually correct. Moving party has failed to do this. No declaration is presented by anyone who claims to have been an auditor or supervisor of an auditor who treated with plaintiff. It is not proven that those who did treat with plaintiff did so out of religious conviction. If those persons acted *as alleged*, their conduct is actionable.

4) Considering the proximity of a trial date, the running of the 5-year period, and the nature of the motion (it could have been brought at almost any point in the litigation and the absence of the statutory showing, ruling should not be deferred under 437c (h). Bifurcation should be decided by the trial court.

Counsel for responding parties are to prepare the orders and submit with approval as to form.

The Court orders the County Clerk to safeguard the file in a single place pending formal order for sequestering. Court will mail Intended Decision to counsel re sequestering for comments, prior to making formal order.

MINUTES ENTERED

June 14, 1985

COUNTY CLERK

No. 86-1082

(2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioner,

v.

LARRY WOLLERSHEIM,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District

---

BRIEF IN OPPOSITION

Of Counsel:

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

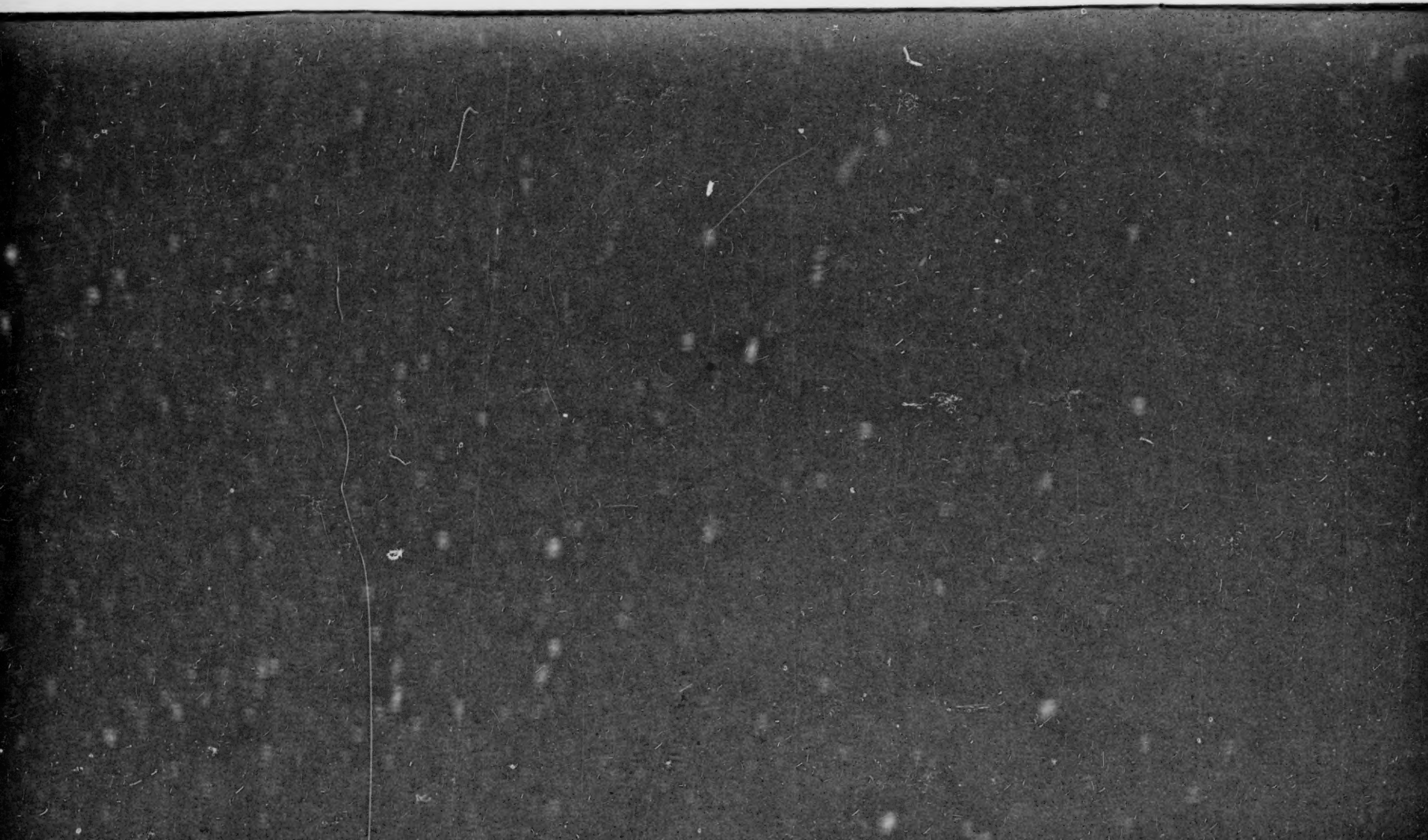

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TABLE OF AUTHORITIES

CASES

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1082

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioner,

v.

LARRY WOLLERSHEIM,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California Second Appellate District

---

BRIEF IN OPPOSITION

For the reasons stated herein the petition for a writ of certiorari should be denied. The California Court's order, to which the petition is now directed, denied petitioner's request for a discretionary unsecured stay of execution of judgment pending resolution of its appeal. The denial was a proper exercise of the court's discretion and did not deprive petitioner of any constitutional right nor decide the constitutional issue that petitioner asserts as the basis for certiorari review herein.

STATEMENT OF CASE

On October 1, 1986, the Second Appellate District of the Court of Appeal for the State of California (hereinafter Court of Appeal), in an exercise of its discretion-

ary powers, denied petitioner's request for an unsecured stay of execution pending resolution of its appeal from a money judgment entered on July 22, 1986, in the Superior Court for the State of California, County of Los Angeles (hereinafter referred to as the Superior Court). Petitioner claims that this discretionary denial of an unsecured stay deprived petitioner of its right to a meaningful appeal in violation of due process of law and affects the religious practices of its members.

On September 29th, petitioners invoked the appellate jurisdiction by filing a notice of appeal from the judgment, and at that time also applied for an unsecured stay of execution pending resolution of its appeal.[1] (Petition for Writ of Supersedeas or Other Appropriate Stay Order, hereinafter referred to as "request for stay".)

Therein petitioner argued that the judgment would be reversed by its appeal and that without a stay order it would be rendered bankrupt before its contentions on appeal were considered. Petitioner also stated that the judgment, unless stayed, violated the "religious freedom" rights of its alleged members.

Respondent opposed the request for a stay as the matters of record were contrary to petitioner's claims. The matters of record disclosed that there was no merit to the appeal, that there was no prejudice or harm to petitioner and that there was substantial risk of prejudice to respondent. (Response to Request for Immediate Stay and Petition For Writ of Supersedeas, filed October 1, 1986.)

On October 1, 1986, the Court of Appeal exercised its discretion and denied the request for stay.

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[1] Petitioner requested in the alternative that the statutory undertaking for an automatic stay on appeal be reduced to $3,000,000.00.

On October 6, 1986, the Supreme Court of California denied petitioner's de novo request for a stay of execution and its petition for review of the October 1, 1986 order of the Court of Appeal.

Petitioner then filed an application for a stay of execution herein, contending that the October 6, 1986 order of the Supreme Court of California was unconstitutional and warranted certiorari review by this Court.

The petitioner argued that this Court would exercise certiorari jurisdiction and review the October 6th order, if petitioner were allowed to prepare and file a petition herein.

Petitioner however now urges instead, the October 1st order of the Court of Appeal as the decision warranting certiorari review.[2]

ARGUMENT

Petitioner asserts no facial constitutional challenge to the state-law standards governing an unsecured stay on appeal. Petitioner instead questions solely the Court of Appeal's *application* of those standards to the contested facts of this case. This case neither raises nor decides an important Federal issue warranting the attention of this Court.

1. California law provides that the filing of a notice of appeal from a money judgment will automatically stay execution on appeal if the appellant complies with the statutory provisions for an automatic stay. (*California Code of Civil Procedure*, Section 917.1, reprinted in Appendix A of the Petition for a Writ of Certiorari, herein).

An appellant may also obtain a stay of execution on an unsecured money judgment on appeal by applying

---

[2] Petitioner also states that if the October 1, 1986 order is determined to be an exercise of discretion, then the orders of the California Superior Court should instead be reviewed by certiorari (Petition, p. 1, n.1).

directly to the Court of Appeal or the Supreme Court of the State of California (*California Code of Civil Procedure*, Section 923, reprinted in Appendix A of the Petition for a Writ of Certiorari). Unlike the stay that issues automatically upon posting of statutory bond or undertaking, the appellant here must make a showing of irreparable harm, probable merit and an absence of prejudice. (*Davis v. Custom Component Switches, Inc.*, 13 Cal. App. 3d 21 (1970).)

As petitioner itself states, under California law,

> supersedeas lies to stay execution of judgment without statutory undertaking when (a) an appellant will otherwise suffer irreparable injury and a stay is necessary to preserve the issues on appeal; (b) an appellant has a meritorious appeal; and (c) respondent will not be unduly prejudiced by the relief granted. (Pet. 7, n.7).

In the Court of Appeal, petitioner did not contend that the standards governing an unsecured stay on appeal were constitutionally infirm. To the contrary, petitioner argued that California's procedural scheme was compelled by and *consistent with* precisely the same constitutional considerations petitioner stresses before this Court. See, *e.g.*, Petition for Review and Request for Immediate Stay, at 11 (filed Oct. 2, 1986, Supreme Court of California).[3] In the state courts, petitioner contended that, on *petitioner's* view of the facts, the state-law standards entitled petitioner to the relief sought. The dispute in the state courts was solely as to the facts and not as to any issue of law.

Before this Court, petitioner does not assert a constitutional challenge to California's statutory bonding requirement or to the standards governing an unsecured

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[3] This document was previously supplied to this Court in connection with petitioner's application for a stay pending disposition of this petition.

stay on appeal.[4] As petitioner has acknowledged, petitioner's constitutional claim here "is that the California scheme *as applied* by the California courts in this case effectively den[ies] [petitioner] the means to a meaningful appeal." Petitioner's Reply Mem. to Respondent's Opposition To a Stay (Oct. 14, 1986, U.S. Supreme Court) (emphasis in original). As in the state courts, petitioner's claim turns not on any disagreement as to the governing legal principles but on the application of those principles to facts that are sharply disputed, many of which were established to the contrary of petitioner's contentions by the jury's findings. (See part 2, *infra*). Thus, at best, petitioner is situated no differently from any other party who has asserted a constitutional claim before a state trial or appellate court but has failed to make out that claim to the court's satisfaction on the *facts* of the case.[5] Accordingly, petitioner's case does not warrant plenary review by this Court.

2. The central basis for petitioner's claim to an unsecured stay or a waiver or reduction of bond in the Court of Appeal and before this Court is petitioner's claimed inability to obtain the funds necessary to post bond. As petitioner states, "[t]he essence of petitioner's argument here is its inability to post any bond beyond that of its unpledged assets." (Pet. 18, n.16). Petitioner

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[4] Indeed, petitioner's failure to make such a claim in the California courts bars petitioner from asserting it here. See, *e.g.*, *Webb v. Webb*, 451 U.S. 493 (1981); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

[5] Indeed, it is questionable whether petitioner preserved *any federal* issue for review in this Court. Petitioner never contended directly in the California courts that the state statutory scheme, if applied to require a bond in excess of the amount petitioner asserted it could raise, would violate the United States Constitution as applied. Rather, petitioner asserted its entitlement to relief under the state-law standards, on the facts of the case. In a direct sense, the refusal of the state courts to grant such relief raises only issues concerning the application of *state* law.

has based this plea on the assertion that petitioner is a separately incorporated entity distinct from other organizations that were once part of its formal corporate structure and that petitioner's sole resources consist, accordingly, of funds held by this corporate entity as distinguished from funds held by such other organizations once owned by petitioner. This position, however, was sharply contested in the trial and before the California courts. Respondent produced evidence and contended that the record in this case makes clear that petitioner is not an independent operation by any means, and that the wall petitioner has attempted to erect between its assets and those nominally allocated elsewhere to other organizations is a sham.

It is undisputed that as of the date respondent commenced this suit, petitioner was the "Mother Church" of Scientology. See Petition for Review and Request for Immediate Stay, at 3 (filed Oct. 2, 1986, Supreme Court of California). One of petitioner's directors, Lynn Farney, testified in the trial that as the result of an extensive "corporate reorganization" that took place *subsequent to the commencement* of this lawsuit "the only thing that [now] constitute[s] the Church of Scientology of California, the only function it serve[s] [is] to house the Office of Special Affairs"—or, more formally, "the Office of Special Affairs U.S." (Tr. 14,306, 14,309-14,310).[6] This "Office," the record shows, is an arm of the successor "Mother Church," the "Church of Scientology International."

The principal if not sole functions of the California "Office," according to Mr. Farney, are to provide administrative and paralegal services in connection with lawsuits, such as this one, against the Church of Scientology —including the payment of settlements in such actions—

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[6] Portions of the Farney testimony were previously provided to the Court in connection with the Application for Stay.

and to handle "public relations." (Tr. 14,306, 14,313-14,314; Tr. Sept. 26, 1986, at 17). As the trial court stated, and as petitioner's counsel claimed before that court, the California "Office" numbers among its assets no "real estate" representing church facilities for "parishoners to have a place to pursue their religious interests," and "no religious artifacts." (Tr. Sept. 26, 1986, at 3, 5). The only assets it claims consist of "mortgages and a few accounts receivable, and . . . some gold bullion." (*Id.* at 7). As the trial court concluded, "[t]he state of the record is that the Church of Scientology of California, Inc., is a mere shell." (Tr. Sept. 26, 1986, at 3-4).

Further, the California "Office" does not provide its non-ecclesiastic functions on behalf of petitioner as an entity distinct from the Mother Church. Rather, as petitioner's counsel conceded before the trial court, the California "Office" "administ[ers] to the legal problems of the Scientologists across the country and across the world." (Tr. Sept. 26, 1986, at 11).

The record makes clear, therefore, that petitioner's ostensible, separate corporate existence is a sham. The reality is that petitioner is not an entity distinct from the larger church. Petitioner's insistence that its sole resources are those assets nominally allocated within the larger church to petitioner's separate accounts is contrary to the facts.

Petitioner made no showing that the organization *behind* its claimed shell lacks sufficient assets to meet the statutory bond requirement. Thus, petitioner simply failed to establish the essential factual predicate of its application for an unsecured stay on appeal or a reduction of bonding provisions.

3. Contrary to petitioner's assertion, *Pennzoil Company v. Texaco, Inc.*, No. 85-1798, prob. juris. noted, —— U.S. ——, 106 S. Ct. 3270 (1986), poses different issues

from the question raised in this case, and a decision in *Pennzoil* will not affect the outcome of this case.

To begin with, the threshold question in *Pennzoil* is whether a *federal* court may enjoin the application of a *state* bond requirement imposed in the course of ongoing state court proceedings. This case raises no similar issues of federal/state relations. The issue here is whether the California courts properly applied their own standards, which are indisputably constitutional, to the facts of this case.

Further, the state statute at issue in *Pennzoil* imposes "an inflexible requirement for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted . . . ." *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986). The Second Circuit found that such an "inflexible" requirement denies a fair opportunity to pursue an appeal where satisfaction of the requirement would effectively destroy the existence of the party seeking to appeal. The Second Circuit held that due process requires that a party seeking to appeal be given the opportunity to demonstrate entitlement to a stay of execution of a judgment, or to reduction of the required bond, under the following standards:

> The plaintiff has the burden of showing irreparable harm *and* (1) either probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *plus* a balance of hardships tipping decidedly in the plaintiff's favor.

784 F.2d, at 1152.

The California procedures provide for an unsecured stay on virtually the same terms as those set down by the Second Circuit in *Pennzoil*. (See p. 4, *supra*). No party in *Pennzoil* argues that the Federal Constitution requires *more* protection than the Second Circuit pre-

scribed.[7] This Court, then, would have no occasion in *Pennzoil* to establish constitutional standards more stringent than those applied by the California courts in this case. And if this Court holds in *Pennzoil* that the Second Circuit went too far—*i.e.*, that the Constitution does not require *as much* protection—that will make no difference to this case, for petitioner has been denied relief on the facts of this case under standards virtually equivalent to the Second Circuit's. Further, regardless whether the Constitution compels state courts to grant an unsecured stay or to waive or reduce bonds when the kind of showing delineated by the Second Circuit is made, the California courts have chosen to do so as a matter of *state* law. In the instant case, petitioner simply failed to make the requisite factual showing.

The pendency of *Pennzoil* before this Court, therefore, provides no ground for granting the petition in this case. And because a decision in *Pennzoil* will not affect the outcome of this case, the petition should not be held pending the disposition of *Pennzoil*. Denying the petition outright is especially important in the circumstances of this case, moreover, because this Court has directed that enforcement of the California judgment be stayed pending the Court's disposition of the petition. In the absence of a bond protecting the judgment awarded to respondent, delay in enforcement of that judgment, occasioned by a determination by this Court to hold the petition pending a decision in *Pennzoil*, would impair not only respondent's legitimate interests but also the state's interest in enforcement of its courts' judgments.

4. Finally, petitioner's contention that this case raises issues "even more critical" than those involved in *Pennzoil* because imposition of the bond requirement here will "destroy the religious free exercise rights of

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[7] Nor does petitioner make that argument in this case.

[petitioner's] members" (Pet. 3), is factually ill-founded and disingenuous. This contention is based upon petitioner's insistence that it is unable to meet the bond requirement for an automatic stay on appeal and was therefore entitled to an unsecured stay. We have shown that petitioner failed to establish this claim factually in the courts below. Moreover, petitioner's free exercise claim is premised on mutually inconsistent propositions. As we have discussed, petitioner's claim of inability to pay is premised upon petitioner's assertion that it is a distinct corporate entity. If petitioner had been able to substantiate this assertion, petitioner could *not* at the same time maintain that the financial dissolution of petitioner would destroy the religious rights of Scientologists. This is so because, as the trial court found, the purported distinct corporate entity—the California "Office"—is "not operating *ecclesiastical* functions." (P. 7, *supra*) (emphasis added). If petitioner proposes to treat the claimed *ecclesiastical* organizations within the church and the California "Office" as a single entity for purposes of asserting claimed religious rights, then the assets of *this* overall entity—not simply of the shell constituting the California "Office"—must fairly be considered for purposes of applying the standards. Petitioner cannot have it both ways. Petitioner cannot plead poverty on the basis solely of the assets nominally assigned to the accounts of the California "Office," while at the same time asserting religious rights that can only be asserted by claimed ecclesiastical organizations of the church.

CONCLUSION

For the foregoing reasons, petitioner's request for a writ of certiorari should be denied. The case should not be held pending a decision in *Pennzoil*, as the resolution of that case will not affect the outcome in this case.

Respectfully submitted,

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DATED: March 6, 1987

No. 86-1082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioner,

v.

LARRY WOLLERSHEIM,
Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1986

No. 86-1082

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

LARRY WOLLERSHEIM,

Respondent.

MOTION FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE

The National Association for the Advancement of Colored People ("NAACP"), hereby respectfully moves this Court for leave to file the attached brief as amicus curiae, in support of the Petition for Writ of Certiorari pursuant to Rule 36.1 of this Court's Rules. The brief amicus curiae is being conditionally filed with this Motion, copies of

which have been served upon all parties. The written consent of the petitioners is on file with the Clerk. Respondents have refused their consent.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-1082

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

LARRY WOLLERSHEIM,

Respondent.

BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus Curiae National Association for the Advancement of Colored People (NAACP), is an organization dedicated to the furtherance of racial equality and social and economic justice in this country. To promote these ends, the NAACP and its members engage in activity

protected by the United States Constitution, including petitioning the government for the redress of grievances, marching and demonstrating in peaceful fashion, alerting the community to instances of discrimination, and advocating and organizing concerted action to influence the political process and to spur social change. At times these activities have met with legal action and threats of legal action in state courts. The NAACP has no fear of such legal action so long as the doors of the appellate courts--including this Court--are open to it to vindicate its rights. But if the NAACP were required to post a substantial supersedeas bond in order to gain effective access to the appellate process, it would not be able to do so; neither would many other public interest organizations, small businesses, or most

ordinary citizens. It is for that reason that the NAACP is filing a brief in this case.

The NAACP has had first-hand experience with the effect of an unreasonable supersedeas bond on the appellate process. As a result of boycott activities subsequently held by this Court to be conduct protected by the First Amendment, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), a Mississippi trial court assessed damages against the NAACP in excess of $1 million. Mississippi law required the posting of a supersedeas bond equal to 1-1/4 times the amount of the judgment in order to stay immediate execution of that judgment pending appeal. Because the NAACP could not meet this bond requirement and because immediate execution of the judgment would have bankrupted the organization, the NAACP sought limited

relief in federal court from Mississippi's bond requirements, claiming that the application of those requirements effectively deprived the NAACP of its constitutional rights. Had the federal courts not stayed the application of the bond requirements by enjoining enforcement of the judgment pending appeal to the Mississippi Supreme Court and thereafter to this Court, Henry v. First National Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979), cert. denied sub nom. Claiborne Hardware Co. v. Henry, 444 U.S. 1074 (1980), the NAACP would not have survived as an organization and could not have vindicated its First Amendments rights in this Court.

The NAACP urges the granting of the petition for certiorari in order that this Court may determine whether the refusal of the California Court of Appeals to stay

execution or reduce the oppressive supersedeas bond violates petitioner's rights under the Due Process clause of the Fourteenth Amendment. The arguments presented herein are identical to the arguments set forth in the NAACP amicus curiae brief that has been filed in support of Texaco, Inc., in Pennzoil Company v. Texaco, Inc., _____ U.S. _____.

SUMMARY OF ARGUMENT

Due Process precludes a state from imposing supersedeas bond requirements that are so oppressive that they effectively deny a litigant access to the state's appellate courts and, thereafter, access to this Court. Even if Due Process does not preclude such bond requirements as to all litigants, it must preclude them as to involuntary state-court defendants whose only available process is appellate review. At a bare minimum,

where fundamental constitutional rights are at issue, a litigant cannot constitutionally be denied access to state appellate courts through application of an oppressive supersedeas bond.

ARGUMENT

I. A State May not Constitutionally Prohibit Meaningful Access To Its Appellate Courts Through Imposition of An Oppressive Supersedeas Bond Requirement

The NAACP acknowledges, of course, that the states are not constitutionally required to provide appellate court review of their trial courts' judgments;[1] on the other hand, it is well-settled that whatever appellate review the states do provide must meet the requirements of Due Process.[2] The NAACP also acknowledges that Due Process is not necessarily offended by the requirement of a reasonable

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1. Lindsey v. Normet, 405 U.S. 56,77 (1972).

2. See Evitts v. Lucey, 469 U.S. 387, 400-01 (1985). Similarly, even if the state is not required to provide mechanisms for suspension of judgments pending appeal, see Louisville and Nashville R.R. v. Stewart, 241 U.S. 261, 263 (1916), having provided such mechanisms the state must comply with the requirements of Due Process and Equal Protection in permitting litigants to employ those procedures.

supersedeas bond in connection with a stay granted to a losing party pending appeal; indeed, such a bond fairly serves to protect the prevailing party during the appeal process.

But a bond that is so oppressive upon the appealing party that it effectively precludes meaningful review--and is out of all proportion to any necessary protection of the prevailing party's interest--necessarily violates Due Process. In the Henry case, for example, the NAACP would have been bankrupted had it been forced to comply with Mississippi's supersedeas requirements. 595 F.2d at 299-300, 305. Such draconian requirements prevent review as effectively as a rule that simply prohibits appeal altogether and should therefore be held violative of Due Process.

Any other conclusion would contradict

a fundamental precept of our system of jurisprudence--that no party should be precluded access to the courts by virtue of unreasonable requirements which it cannot meet. Under that standard the Church of Scientology of California may be entitled to be free of the California's bond requirements for the same reasons that the NAACP was entitled to be free of Mississippi bond requirements in the Henry case. The important point is that a supersedeas bond is offensive to Due Process whenever it imposes unreasonable, oppressive, and unnecessary requirements as the price of an appeal, no matter the relative wealth or poverty of the would-be appellant. As this Court stated in Boddie v. Connecticut, 401 U.S. 371 (1971), "[j]ust as a generally valid notice procedure may fail to satisfy due process

because of the circumstances of [a particular] defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." Id. at 380 (emphasis added).

While we believe the principle recognized in Boddie should be controlling in this case, certain decisions subsequent to Boddie suggest that the Due Process right to be heard may be appropriately limited to (1) circumstances in which the party has no remedy other than the judicial forum, or (2) circumstances in which the underlying issue on which the party wishes to be heard involves a "fundamental" right. Thus, in United States v. Kras, 409 U.S. 434 (1973), the majority explained that "Boddie was based on the notion that a State cannot deny

access, simply because of one's poverty, to a "'judicial proceeding [that is] the only effective means of resolving the dispute at hand.'" Id. at 443 (quoting Boddie, 401 U.S. at 376) (emphasis added).[3] In addition, the kras majority thought a debtor's interest enjoyed less Due Process protection than the interest at issue in Boddie:

> Bankruptcy is hardly akin to free speech or marriage or to those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that

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3. Kras, an indigent, allegedly unable to pay the filing fee required for a voluntary petition in bankruptcy, was thought not to have a Due Process right of access to the courts because he had alternative non-judicial avenues of relief. Boddie, on the other hand, involved indigent parties seeking a divorce, a remedy available to them only in court. Comparing these two situations, the Kras majority stated:

> In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relation-

> demand the lofty requirement of a compelling governmental interest before they may be significantly regulated. See Shapiro v. Thompson, 394 U.S. 618, 638 (1969). Neither does it touch upon what have been said to be the suspect criteria of race, nationality, or alienage.

409 U.S. at 446 (citation omitted).

By contrast, this Court more recently found unconstitutional Connecticut's requirement that the costs of blood tests used to disprove paternity be charged against an indigent defendant who could not afford the tests. Lacking those tests, the defendant was adjudged to be the father. Little v. Streater, 452 U.S. 1 (1981). In distinguishing the Kras and Ortwein[4] cases, this Court observed that

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> ship with his creditors. The utter exclusiveness of court access and court remedy, as has been noted, was a potent factor in Boddie.

Kras, 409 U.S. at 445

4. In Ortwein v. Schwab, 410 U.S. 656 (1973), a majority of this Court determined that welfare recipients' Due Process rights

> [o]ur decisions in Kras and Ortwein emphasized the availability of other relief and the less "fundamental" character of the private interests at stake than those implicated in Boddie. Because appellant has no choice of an alternative forum and his interests, as well as those of the child, are constitutionally significant, this case is comparable to Boddie rather than to Kras and Ortwein.

Id. at 16 n.12 (emphasis added).

There are several important implications of Boddie and its progeny for the present case. First, it appears that an oppressive supersedeas bond may offend Due Process where its imposition effec-

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were not violated by a state's requirement that they file a $25.000 fee in order to pursue a judicial appeal of agency determinations marginally adjusting their benefits. In so holding, this Court again relied upon the existence of non-judicial "alternatives, not conditioned on the payment of fees," through which the appellants had been able to seek relief. Id. at 659. The Court also noted that, as in Kras the interest asserted by these welfare litigants was of less constitutional significance and was therefore entitled to fewer Due Process protections than that at issue in Boddie. Id. at 659.

tively and unreasonably denies the right to be heard.

Second, even if such a bond does not violate the Due Process rights of every would-be litigant who is unable to satisfy the bonding requirements, it surely does so in the case of an involuntary state-court defendant who has no alternative remedy or forum for his claim except the state's courts. In other words, a state may afford Due Process through different procedures or forums, but if the only process the state offers to a party for vindication of its claims is the courts, meaningful access to those courts must be afforded.[5] Thus, every involuntary state-

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5. As the Court stated in Boddie:

> (T)he successful invocation of this governmental power (the judiciary by plaintiffs has often created serious problems for defendants' rights. For at that point, the

court defendant--like the NAACP in Henry and the Church of Scientology of California here-- has a Due Process right that any state-created judicial appeal be free from an oppressive or impossible bond requirement that effectively denies that defendant a meaningful opportunity to be heard.[6]

> judicial proceeding becomes the only effective means of resolving the dispute at hand and the denial of defendants' full access to that process raises grave problems for its legitimacy.

Boddie, 401 U.S. at 376 (emphasis added). The Court made this same point in Streater, in which it stressed that a defendant sued in state court for paternity payments had "no choice of an alternative forum" in which to vindicate his interests. Streater, 452 U.S. at 16 n.12; see also Kras, 409 U.S. at 444. Likewise in Ortwein, 410 U.S. at 659-60, the Court stressed that appellants had been provided a hearing in a non-judicial forum, an alternative not conditioned on payment of a fee, in which the appellants were able to press their claims.

6. Relying on Boddie, Kras, and Ortwein, the Third Circuit in Lecates v. Justice of the Peace Court No. 4, 637 F.2d

The final implication of the Boddie line of cases is that at a bare minimum Due Process includes a right to be free of an oppressive bond where the merits of the appeal involve "fundamental rights." While we do not believe that Due Process protections may be limited to certain "fundamental rights,"[7] nevertheless it is important that the Court at the very least reaffirm in this case the special procedural protection those rights enjoy.

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898 (3d Cir. 1980), found unconstitutional as applied Delaware's requirement that an indigent defendant post a surety bond in order to secure a trial de novo in Superior Court following an adverse determination by a justice of the peace. In reaching that determination, the Court found critical the state-court defendant's lack of alternative avenues for relief. Id. at 908-09.

7. The justification for such line-drawing is certainly not in the Constitution. The Fourteenth Amendment broadly commands the states to afford parties Due Process in every situation in which it proposes to deprive them of life, liberty,

The fundamental rights described in Kras involve numerous matters of great interest to the NAACP, including free speech, right to travel, and issues involving racial discrimination. 409 U.S. at 446. Hence, if the Court does nothing else in this case, it should make clear that the Constitution will not permit oppressive state bond requirements to undermine a right of appeal, at least where that appeal involves fundamental constitutional rights, as it did in Henry. Situations comparable to the facts involved in Henry are arising with

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or property; the Amendment nowhere limits the Due Process protection to cases involving "fundamental rights."

some frequency,[8] and it is vital that the

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8. For example, quite recently the Mississippi chapter of the NAACP sponsored a boycott of white businesses and public schools in Indianola to respond to apparent racial discrimination in the local school system. United Press International, Apr. 16, 1986, Section Regional News (available on NEXIS). State and local NAACP chapters are also involved in a boycott of white merchants in the prosperous suburb of Dearborn, Michigan, which excluded nearby blacks from a local park by means of a "residents only" rule, N.Y. Times, Oct. 10, 1986, at A14, col. 3; a boycott of Shell Oil products to protest that company's investments ties to South Africa, Platt's Oilgram News, Section United States, vol. 64, no. 161, at 3; a boycott of white businesses in Baton Rouge, Louisiana, to protest allegedly racially motivated grievances lodged against a black school principal, "Local NAACP Board Votes to Boycott White Merchants," Associated Press, May 29, 1986 (available on NEXIS); and a school boycott in a rural Georgia district to protest the lack of minority teachers, "Lack of Black Teachers Sparks Rural Georgia School Boycott," Associated Pres, Aug. 23, 1986, Section Domestic News (available on NEXIS). The NAACP has also been sued for defamation for its criticism of a police officer for unnecessary brutality in effecting an arrest. NAACP v. Moody, 350 So. 2d 1365 (Miss. 1977).

rule adopted here leave open the opportunity for parties to protect their access to the appellate courts in such cases.[9]

In yet another example, three senior citizens seeking free access to a local community center for NAACP meetings staged a lawnchair protest outside the mayor's drugstore to discourage business. The three were then arrested under a Mississippi anti-boycott statute enacted as a result of the civil rights actions at issue in Henry. "Lawn Chair Protesters May Be Back When Its Cooler," Associated Press, Aug. 26, 1986, Section Domestic News (available on NEXIS); "Store Boycott Spurs Constitutional Fight," L.A. Times May 23, 1986, Part 1, at 19, col. 1. After repeated arrests, the bond on one of the participants, the president of the local NAACP chapter, rose to $10,000, forcing the group to abandon the protest temporarily for financial reasons. Although the state Attorney General's office declined to prosecute, private civil action by the mayor remains possible. "Lawn Chair Protesters May Be Back When Its Cooler," Associated Press, Aug. 26, Section Domestic News.

9. All of these situations present potential Henry problems. Inherent in any case in which the NAACP must defend a state court action for damages arising from its expressive activities is the potential for a crippling, yet unconstitutional, judgment subject to immediate

CONCLUSION

For the reasons discussed above, amicus curiae National Association for the Advancement of Colored People urges this Court to grant petitioner Church's petition for certiorari.

Respectfully submitted,

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enforcement unless the NAACP posts an equally crippling supersedeas bond to preserve an appeal made virtually irrelevant by the bond itself.

No. 86-1082

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CHURCH OF SCIENTOLOGY OF CALIFORNIA,
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v.

LARRY WOLLERSHEIM,
Respondent.

**Petition For A Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
Second Appellate District**

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Petition For A Writ Of Certiorari
To The Court Of Appeal Of The State Of California,
Second Appellate District

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Council of Churches of Christ in the U.S.A. hereby respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of the Petition for Writ of Certiorari pursuant to Rule 36.1 of this Court's rules. The Brief Amicus Curiae is being conditionally filed with this Motion, copies of which have been served upon all parties. The written consent of the petitioners is on file with the Clerk. Respondents have refused their consent.

The National Council of Churches feels that the issues presented in the Petition for Writ of Certiorari, as well as the issues presented in the appeal on the merits before the California Court of Appeal, are of vital interest to its constituents. Some of the denominations represented by the National Council of Churches are congregational in nature. The individual congregations of these denominations would be hard pressed to meet a bond requirement that was even a small fraction of that involved in this case.

The National Council of Churches does not feel that the Petition for Writ of Certiorari gives sufficient emphasis to the due process issues raised in this case by the punitive damages and the proportion of the bond requirement that they represent. Amicus believes that punitive damages assessed against religious bodies impose an unconstitutional burden on First Amendment free exercise rights.

The National Council of Churches also believes that the Petition for Writ of Certiorari does not apprise the Court of the full extent of the problem posed by excessive punitive damages awarded against religious bodies. The National Council desires to bring to the Court's attention a sampling of verdicts representing a recent trend toward attacking religious groups through the use of civil courts and particularly punitive damage awards.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A. IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The National Council of Churches of Christ in the U.S.A. is the cooperative agency of 32 national Protestant and Eastern Orthodox religious bodies in the United States, having an aggregate membership of over 40 million. This brief does not purport to represent the views of all of those persons, but is based on policy determined by their representatives sitting as the Governing Board of the National Council of Churches, a deliberative body of

about 250 persons chosen by the member denominations in proportion to their size and support of the Council. The policy which underlies this action was expressed by the Board in 1955: "The National Council of Churches defends the rights and liberties of cultural, racial and religious minorities." Policy Statement: Religious and Civil Liberties in the U.S.A.

The National Council of Churches believes that novel theories of tort liability based upon religious practices and beliefs pose a serious threat to the religious freedom of its member churches. It further believes that it is imperative that churches have ready recourse to the appellate courts in order to protect their First Amendment rights.

SUMMARY OF ARGUMENT

This case presents a critical issue of due process on which this Court has not spoken and on which lower courts need guidance. Although the Court heard arguments earlier this term on very similar issues in *Texaco, Inc.* v. *Pennzoil Co., prob. juris. noted*, ___ U.S. ___, 106 S.Ct. 3270 (1986) (No. 85-1798), this case does not contain the abstention and comity questions present in that case. It does contain factors not present in *Texaco* which make review by this Court of great importance to constitutional jurisprudence.

Execution of the judgment in this case threatens the destruction of a religious organization, and the total suppression of protected First Amendment activities. The merits of the appeal below raise substantial First Amendment questions concerning the liability of religious groups for damages alleged to result from the content of their teachings. It is imperative that petitioner have a chance to present these issues to the appellate courts of California, and possibly this Court, before it is driven out of existence

by execution of the judgment. Rigid application of the bonding requirement in this case infringes First Amendment rights in addition to due process rights.

Also, more than 80% of the judgment below represents punitive damages assessed against an unpopular religious group. Imposition of these damages in itself raises due process concerns. Procedural guarantees present in criminal cases are not available to defendants faced with punitive damage awards. The vague standards by which juries decide whether or not to impose punitive damages and what amount to award will cause churches to temper their religious zeal or evangelize at the risk of financial ruin.

Allowing a bonding requirement to prevent review of the damages compounds the constitutional infringement. Since punitive damages do not compensate the injured, but are instead a windfall, the state interest protected by the bond requirement is less than compelling with respect to the punitive portion of the verdict.

Further, the judgment in this case represents a recent trend toward excessive jury verdicts for punitive damages assessed against religious groups. This trend increases the urgency for this Court's pronouncement in this case lest juries be allowed to destroy unorthodox religions, or even orthodox but small religious bodies, without check by higher courts.

Finally, the punitive damages awarded harm not the alleged wrongdoers, but innocent members of the religious group saddled with the judgment. This in itself is unconstitutional. A constitutional challenge to the award of punitive damages in this case should not be precluded by a bond requirement made prohibitive by the very size of the verdict being challenged.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS CRITICAL ISSUES OF DUE PROCESS NOT RULED ON BY THIS COURT AND NOT PRESENT IN THE *TEXACO* v. *PENNZOIL* CASE.

A. Execution Of The Judgment Will Suppress Protected First Amendment Activities.

Amicus believes the failure of the California courts to waive or substantially modify the bond requirements of Cal. Code of Civil Procedure § 917.1 without comment or opinion violates the due process and First Amendment rights of free exercise of the petitioner. This Court has recognized that the Fourteenth Amendment right to due process guarantees that a state, once it has created a right of appeal, must not arbitrarily deny a litigant "a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts* v. *Lucey*, 369 U.S. 387, 405 (1985); *see*, *Griffin* v. *Illinois*, 351 U.S. 12 (1956). In *Texaco, Inc.* v. *Pennzoil Co.*, 784 F.2d 1133 (2nd Cir. 1986), *prob. juris. noted*, ___ U.S. ___, 106 S.Ct. 3270 (1986), the Second Circuit held that a litigant's right to appeal would be rendered meaningless if, by enforcement of a state bonding requirement that was impossible for the party to meet, that party was unable to stay execution of a judgment pending appeal that would financially destroy it.

By noting probable jurisdiction and hearing oral arguments in the *Texaco* case, this Court acknowledged the importance of the due process issue raised in that case—and in this one. Several aspects of this case present more compelling reasons for review by this Court than were present in the *Texaco* case. One such aspect is the fact that the amount of the bond required here is from 1 1/2 to 2 times the amount of the judgment compared to a bond equalling the amount of the judgment in *Texaco*. While it is not unique to California to require a bond in excess of

the judgment, inflexible application in a case involving the astronomical damages here, particularly in relation to the assets of the petitioner, aggravates the due process violation.

But the truly compelling reason for a review by this Court of the issues presented lies in the nature of the interest that will be harmed if the bonding requirement is enforced. Unlike *Texaco*, a purely commercial enterprise, the petitioner is a religious institution. Execution of the judgment in this case will make it impossible for it to carry out its religious function.[1] To allow a church to be financially wiped out by execution of a judgment before it has an opportunity to appeal that judgment raises serious First Amendment concerns in addition to the due process implications. This is particularly true where, as here, the appeal on the merits involves substantial constitutional claims with a strong likelihood of success.[2]

Similar considerations led the Fifth Circuit to affirm an injunction staying execution of a $1.25 million judgment

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[1] Even if petitioner's assets are substantially greater than it asserts, as contended by respondent in his Opposition To Petitioner's Application For Stay Of Execution Of State Court Judgment, posting of the bond would still have a crippling effect on petitioner's operations. Texaco's assets were more than three times the amount of its bond requirement, and its net worth was twice the amount of the bond.

[2] The California Court of Appeal has twice been confronted with the theory of Dr. Margaret Singer that was crucial to the respondent's case on the merits below—*Katz* v. *Superior Court*, 141 Cal.Rptr. 234 (1977) and *Molko* v. *Holy Spirit Association*, 224 Cal.Rptr. 817, *review granted*, 228 Cal.Rptr. 159 (1986). The claims in *Molko* were substantially identical to those of the respondent here. In both cases, the California Court of Appeal found Dr. Singer's theory incompatible with the First Amendment.

against the NAACP without the filing of the required 125% supersedeas bond in *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979). In *Henry*, the NAACP had a judgment entered against it because of a boycott it led protesting racial discrimination. The court found the fact that enforcement of the judgment or posting of the bond would bankrupt the NAACP and eliminate its voice from the debate on public issues to be a crucial factor in affirming the injunction.

This Court has always been sensitive to the need for special protection of unpopular groups from suppression by the majority. *NAACP* v. *Button*, 371 U.S. 415 (1963); *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982). In *Brown*, the Court held that exceptions to statutory requirements valid as a general rule can be required by the Constitution when they affect unpopular groups in the exercise of protected rights.

B. Five-Sixths of The Judgment In This Case Represents Punitive Damages, And It Is This Portion Of The Judgment That Renders Petitioner Incapable Of Satisfying The Bond Requirement.

A further factor weighing in favor of granting the writ in this case, which distinguishes it from *Texaco*, is the amount of punitive damages involved in this case and the proportion of the judgment that they represent. Although punitive damages were included in *Texaco*, they were less than one-third of the entire judgment. Here, they constitute fully five-sixths of the judgment.

Additionally, the compensatory damages awarded against petitioner appear to have been assessed in a punitive amount. When a jury is allowed unbridled discretion in assessing punitive damages in astronomical amounts against an unpopular religious group, First

Amendment and due process rights are impinged. The encroachment is compounded when those punitive damages are included in the bond requirement. The bond requirement is for the protection of the judgment creditor. Punitive damages do not compensate plaintiffs for injury but are private fines levied by civil juries. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Punitive damages represent a windfall for the plaintiff, "to which they concededly have no right." *Rosener* v. *Sears Roebuck & Co.*, 168 Cal.Rptr. 237, 248 (Cal. App. 1980) (Elkington, J., concurring).

The power of juries in California to assess punitive damages is almost unrestricted.

> Jury punitive damage awards of an unpredictable nature and appalling inconsistency continue to proliferate. Neither the Legislature nor the appellate courts have been able to formulate coherent reasonable guidelines and limitations for the remedy. Perhaps the quest is utopian and unrealizable.
>
> In practice, it lacks any semblance of consistency between defendants, or even the same defendant in cases tried by different juries.
>
> Because the Legislature has not prescribed guidelines for punitive damages they may be awarded at whim.

Woolstrum v. *Mailloux*, 190 Cal. Rptr. 729, 737 (Cal. App. 1983).

Included in the jury instructions on punitive damages given in the trial court in this case was this statement: "Now, the law provides no fixed standard as to the amount of such punitive damages. But leave the amount to the jury's sound discretion." (Tr. 14796).

Although punitive damages are penal in nature,[3] the procedural safeguards of criminal proceedings are not afforded to the defendants. They are not protected by the Fifth Amendment right against self-incrimination or the beyond-a-reasonable-doubt standard of proof.

Due process rights can be violated by the vagueness of the standard used to impose punitive damages. This is especially true when liability is imposed for injuries allegedly caused by religious practices.

> [W]here a vague statue "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. *City of Rockford*, 408 U.S. 104, 109 (1972), quoting, *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964), and *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961).

As Justice Elkington stated in his concurring opinion in *Rosener*, "placing unrestricted power in a jury to direct punishment for 'evil intent' by compelling the 'evil doer' to pay money to another without right thereto, seems foreign to any concept of due process known to me." 168 Cal.Rptr. at 248. At the minimum, due process requires that petitioner have the opportunity to appeal such an award of punitive damages before they have the obviously intended effect of destroying an unpopular religious institution.

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[3] For a commentary on the penal aspects of punitive damages, *see* Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L.Q. 241 (1985).

II. THE JUDGMENT RENDERED IN THIS CASE BELOW IS PART OF A GROWING TREND OF PUNITIVE DAMAGE AWARDS AGAINST UNPOPULAR RELIGIONS WHICH NECESSITATES A PRONOUNCEMENT BY THIS COURT INSURING THAT SUCH AWARDS WILL BE REVIEWED BY APPELLATE COURTS.

In *Texaco*, the court of appeals emphasized "the unique and extraordinary circumstances of [that] case, which are unlikely ever to recur." 784 F.2d at 1150. One would hope that the judgment in this case was an equally unique incident of jury prejudice leading to enormous punitive damages against an unorthodox religious group. Sad to say, such is not the case. A short review of recent jury verdicts against religious groups based upon damages alleged to result from membership in such groups reveals a frightening trend: *George* v. *International Society for Krishna Consciousness*, No. 277565 (Cal. Super. Ct., Orange Co., June 17, 1983), *appeal docketed*, 4 Civ. No. G 0003999 (Cal. Ct. App.) (jury verdict of $3.337 million compensatory damages and $29.25 million punitive damages, remittitur accepted reduced compensatory damages to $2.9 million and punitive damages to $7.5 million); *Church Universal and Triumphant* v. *Mull*, No. C358191 (Cal. Super. Ct., Los Angeles Co., April 2, 1986) (jury verdict of $500,000 compensatory damages and $1 million punitive damages); *Christofferson* v. *Church of Scientology of Portland*, No. A77-04-05184 (Ore. Super. Ct. Sept. 5, 1979) (jury verdict for $153,000 compensatory and $1.9 million in punitive damages), *rev'd and remanded*, 644 P.2d 577 (Ore. App. 1982) (on remand, jury verdict for $3 million compensatory and $39 million punitive damages, May 17, 1985, judgment vacated by trial court and new trial granted).

This trend is further illustrated by the following cases which are just a few of the cases presently pending which

request punitive damages against churches: *Day* v. *Faith Baptist Schools*, No. C502019 (Cal. Super. Ct., Los Angeles Co.) ($5 million in punitive damages are being sought in this suit prompted by the expulsion of students for violating religiously-based regulations governing drinking and dancing); *Lipin* v. *Roman Catholic Archbishop of Los Angeles*, No. C43998 (Cal. Super. Ct., Norwalk Co.) ($1 million in punitive damages are sought in this case resulting from a traffic accident involving a rental car driven by an employee of the Catholic Church. The complaint alleges that the driver was advised to wilfully and maliciously assault and batter the plaintiff.); *Brown* v. *Fairview Church of Christ*, No. C427764 (Cal. Super. Ct., Orange Co.) ($3 million including punitive damages are being sought in this case resulting from the disfellowshipping of a member for initiating a divorce contrary to the doctrine of the church.); *Kelly* v. *Christian Community Church*, No. C545117 (Cal. Super. Ct., Santa Clara Co.) ($5 million including punitive damages are being sought in this case prompted by the excommunication of the plaintiff for conduct unbecoming of a member of the church.).

In light of this dangerous trend, it is imperative that this Court insure that religious groups are not denied the opportunity to appeal punitive damage awards by reason of bonding requirements that are dependent on such unpredictable awards, whereby the bonding requirement itself becomes punitive. Failure of the Court to protect strongly the rights of unorthodox religions in this respect will lead to juries being given a free hand to drive out of existence those groups with which they do not agree.

III. THE PUNITIVE DAMAGE AWARD, WHICH MAKES THE BOND REQUIREMENT PROHIBITIVE, IS ITSELF CONSTITUTIONALLY SUSPECT WHEN ASSESSED AGAINST A RELIGIOUS GROUP.

Recognizing that tort liability can burden First Amendment rights, this Court has sought to balance with these

rights the state's legitimate interest in compensating injured persons. In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 349 (1974), the Court held that the "state interest extends no further than compensation for actual injury."

In limiting the power of courts to award punitive damages when First Amendment rights are burdened, the Court had this to say about punitive damages:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions.

Id. at 350.

This Court has also recognized that punitive damages assessed against certain entities have the unacceptable effect of punishing parties other than the wrongdoers whose actions provoked the award. In barring the award of punitive damages against municipalities in § 1983 actions, this Court reasoned as follows:

> [P]unitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

> Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the government entity itself.

Newport v. *Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (citations omitted) (emphasis in original).

Similarly, the Court prohibited the assessment of punitive damages against the union in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 (1979), for the following reasons:

> Because juries are accorded broad discretion both as to the imposition and amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial. Such awards could deplete the union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents. Inflicting this risk on employees, whose welfare depends upon the strength of their union, is simply too great a price for whatever deterrent effect punitive damages may have.

(citations and footnote omitted).

Amicus believes that punitive damages assessed against religious bodies have a similar effect of injuring innocent parties. It is the community of believers, dependent for their spiritual welfare on the institution of which they are members, that suffers the most when their church is driven to bankruptcy by excessive punitive damnages, often awarded because of religious prejudice. It is their voluntary contributions, that were given to support

the religious activities of the church, that are now delivered to a plaintiff as a windfall. Since churches are supported by voluntary contributions, such awards can have a double effect. Besides depleting present assets, they will reduce future contributions. It can hardly be expected that members will continue old giving patterns if they think their donations may simply go to satisfy the punitive judgment.

Unlike the concerns motivating the Court in *Newport* and *Electrical Workers*, the concern for the interest of church members is of constitutional proportions. The very interests of these members that are affeced by such awards are those that were given special protection by the Religion Clauses of the First Amendment.

Amicus intends to file a brief on the merits of this issue in the California Court of Appeal. It would be ironic and tragic if this issue were not presented to the higher courts because the very punitive damages to be challenged were assessed in such an excessive amount that the Petitioner was prevented from meeting the bond requirement necessary to make an appeal meaningful.

CONCLUSION

For the reasons discussed above, amicus curiae National Council of Churches of Christ in the U.S.A. urges this Court to grant petitioner's petition for writ of certiorari.

Dated: March 6, 1987

Respectfully submitted,

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No. 86-1082

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

LARRY WOLLERSHEIM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITIONER'S REPLY MEMORANDUM

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March 18, 1987

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PETITIONER'S REPLY MEMORANDUM

I. Respondent asserts that there is no constitutional issue warranting plenary review. He states that there were factual issues in dispute on the record which were relevant to the California Court of Appeal's consideration of whether or not to issue a stay, and that those factual issues were somehow resolved against petitioner by either the trial court or the California Court of Appeal.[1] From

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[1] During the proceedings in this Court on the application for a stay, respondent made a similar attempt to convince this Court that factual issues weighed against affording any relief. In reply, petitioner demonstrated, apparently at least to the tentative satisfaction of the Court, that there were *no* factual issues in dispute on the record of this case which were relevant to the question of a stay and upon which the California Court of Appeal arguably could have denied petitioner its request for a stay or reduction

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this, respondent argues that certiorari would be inappropriate because the only issue for review is whether the California Court of Appeal properly decided and applied those factual issues.[2]

Respondent's opposition distorts the record and proceedings below. There were no factual issues in dispute on the record of this case which were relevant to the Court of Appeal's determination of whether or not to grant a stay or reduction of bond. The relevant facts of record were simple and uncontroverted:

1. Petitioner was a bona-fide religious organization;

2. Petitioner's net assets were thirteen million dollars, of which 5.1 million dollars were unpledged;

3. Respondent's judgment was for thirty million dollars, twenty-five million of which was for punitive damages;

4. In order to obtain an automatic stay of execution, petitioner would have to post a cash bond of sixty million dollars, or a surety bond of forty-five million dollars, both

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of a bond. Petitioner further pointed out that respondent was free to return to the state court to attempt to prove his unsupported allegations. Petitioner's Reply Memorandum to Respondent's Opposition To A Stay at 5 n. 3. Respondent has made no effort to do so.

[2] Petitioner addressed its petition to the Court of Appeal of the State of California but noted that if the order of that Court is deemed to be a denial of discretionary review, it is respectfully requested that the petition be deemed addressed to the trial court, the Superior Court of the State of California, County of Los Angeles. Since the filing of the petition in this Court, and in light of petitioner's filing its brief on the merits of the underlying appeal in the California Court of Appeal, petitioner has filed a new application for a stay or reduction of bond in the California Court of Appeal. Petitioner will advise the Court of any ruling on that application.

of which were impossible given petitioner's limited assets; and

5. In the absence of a bond, petitioner faced imminent execution of the judgment against its assets, which could destroy it before it could pursue its statutory rights of appeal to the California courts and of certiorari to this Court.

The factual issues which respondent discusses in his opposition in this Court—*e.g.*, whether petitioner is the alter ego of other organizations, or they are its alter ego, and thus whether the assets of such other organizations are relevant to determine whether petitioner can post the statutory bond, or whether petitioner still provides religious services to its members—are not presented by the record of this case. They were not tried or decided in the trial court, and they were not the subject of a hearing or resolution by the Court of Appeal. (*See* Parts II and III, *infra*). Accordingly such questions could not have been the basis for the Court of Appeal's order denying petitioner's request for a stay of execution and reduction of the bond requirement.

The only issue before the Court of Appeal was whether, given the undisputed set of facts and circumstances set forth above (items 1 through 5) which *were* of record and properly before it, petitioner was entitled to a stay of execution without bond, or with a reduced bonding requirement which it could meet as a practical matter. The Court of Appeal's denial of the relief—without a hearing and within two days of filing of the application—squarely raises the constitutional question of whether the California bonding statute, as applied to the undisputed facts and circumstances of this case (and not to factual questions never tried nor decided) violated petitioner's due process, equal protection and First Amendment rights.

Respondent suggests that such "as applied" constitutional challenges to a statute do not merit plenary review by this Court. Respondent's implied preference for facial challenges to the constitutionality of state statutes is contrary to this Court's decisions. Just recently, the Court reiterated that "as applied" adjudication is the "preferred course" of constitutional decision-making "since it enables courts to avoid making unnecessarily broad constitutional judgments." *City of Cleburne* v. *Cleburne Living Center*, —— U.S. ——, 105 S.Ct. 3249, 3258 (1985). Indeed, in *Evitts* v. *Lucey*, 469 U.S. 387, 405 (1985) this Court held that once a state grants a right to an appeal, the state must "offer *each* defendant a fair opportunity to obtain an adjudication on the merits of *his* appeal." (Emphasis added.) *See also Lindsey* v. *Normet*, 405 U.S. 56, 65 (1972); *Boddie* v. *Connecticut*, 401 U.S. 371, 379-80 (1971). Once a party is given the right to appellate review, it has a due process right to a fair opportunity to process that appeal without the effectiveness of the appeal being precluded by an insurmountable bond requirement.[3]

Although *Texaco Inc.* v. *Pennzoil Co.*, 784 F.2d 1133 (2nd Cir. 1986) prob. juris. noted, —— U.S. ——, 106 S.Ct. 3270 (1986) involves an apparently absolute bonding requirement, nothing in the decision suggests that the same due process principles are not applicable to a facially more flexible statute which was inflexibly applied. Indeed, the crux of Texaco's challenge is precisely that the Texas

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[3] Respondent's attempt to obscure the significance of petitioner's claim is underscored by his failure to address the decision of the Fifth Circuit in *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (Petition at pp. 12-13). There, as here, although the state statutory scheme provided a means to reduce or waive the required bond, the state courts refused to do so. The only difference between *Henry* and this case in this respect is that the Church followed the traditional course of exhausting state court process rather than commencing an action in federal district court.

statute as applied to it in that case violates due process. See Brief of Appellee Texaco Inc. at 14-15 in *Pennzoil, Co.* v. *Texaco Inc.*, No. 85-1798. As the opinion of the Court of Appeals for the Second Circuit clearly states, it is the practical effect of the application of the bonding requirement in the context of the particular case which can constitute a due process violation.[4]

It is precisely the practical effect of the summary denial by the California court of petitioner's application without a hearing or statement of the grounds of its decision which has forced petitioner to seek certiorari.[5] As in *Henry* and *Texaco* the state has reduced the Church's right to appeal to a meaningless ritual by denying the Church the means effectively to press its appellate arguments.

II. Respondent asserts that the Court of Appeal denied a stay or reduction of bond because of purported evidence that "petitioner's ostensible, separate corporate existence is a sham" and that the assets of other Scientology churches allegedly are part of petitioner's assets and could be used to meet the statutory bonding requirement (Opp. at 7).

The issue of separate corporate status, however, was not an issue in the trial below and was never litigated,

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[4] Thus, as the Second Circuit stated "[a] state would deny a defendant such a 'fair opportunity' [to obtain an adjudication on the merits of his appeal] if it reduced the appeal to a 'meaningless ritual' by denying him the means effectively to press his appellate arguments. . . ." 784 F.2d at 1154 quoting *Douglas* v. *California*, 372 U.S. 353, 358 (1963). The court continued, "[i]t is self-evident that an appeal would be futile if, by the time the appellate court considered his case, the appeal had by application of a bonding law been robbed of any effectiveness." *Id.*

[5] Respondent's suggestion (Opp. 5 n.5) that it is questionable whether petitioner preserved its federal constitutional claims is without basis. Petitioner clearly raised its claims in the state courts. *See* Petition for Writ of Supersedeas or Other Appropriate Stay Order; Points and Authorities, at 6-7, 19-21. (A copy of the Petition was previously provided to the Court in connection with the proceedings for a stay.)

let alone decided by the trial or appellate court. It is true that, near the end of trial, respondent attempted unsuccessfully to elicit testimony that a corporate re-organization of the church in 1981, pursuant to which various functions of petitioner were transferred to other Scientology churches, resulted in a reduction of the net worth or liquid assets of petitioner. That effort failed to produce a scintilla of evidence, however, to support the respondent's allegation, and the trial court cut short the respondent's line of inquiry as irrelevant to the issue before it (Tr. 14,312-13).[6] Indeed the only evidence in the record of the Superior Court was directly to the contrary.[7] Thus, there

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[6] The trial court's argumentative post-trial remark—by no means stated as a finding or "conclusion"—that petitioner "is a mere shell" (Opp. at 7) was not and could not have been intended as suggesting that petitioner had stripped itself of all assets, in light of the court's own evidentiary rulings, the non-existence of any supporting evidence, and the uncontroverted evidence that petitioner maintained net assets of over thirteen million dollars, 5.1 million of which was unencumbered. Rather, the real import of the trial court's remark, in the context in which it was made, was that since petitioner allegedly no longer provides ecclesiastical services, it cannot claim that execution upon its assets will infringe upon the First Amendment rights of its members. (Tr. Sept. 26, 1986 at 5: "Your argument is directed toward the inability of parishioners to have a place to pursue their religious interests [if execution of judgment is not stayed].")

As noted in the text, (Part III, infra), the trial court's suggestion was wrong for two reasons. First, as petitioner's counsel immediately pointed out to the trial judge, there was no evidence in the record that petitioner now engages only in legal defense or public relations activities. Second, even if the allegation were true, it would not render petitioner "a mere shell" not entitled to First Amendment protection. Indeed, defense of the religious movement against legal or public attacks, and public dissemination and proselytization of the religion (i.e., public relations) are quintessential First Amendment activities. *NAACP* v. *Button*, 371 U.S. 415, 428-31 (1963); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 108-10 (1943).

[7] In a declaration submitted to the trial court pursuant to an evidentiary motion, on which the Church prevailed, church coun-

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is no basis to conclude that the issue of fraudulent transfer of assets played any part in the California Court of Appeal's denial of a stay or reduction of bond.

Nor can conclusions of alter ego status be derived, as respondent attempts to do (Opp. at 7), from the fact that petitioner serves as the legal defense organization for various other Scientology organizations and individuals. Such legal and public defense services are performed by a plethora of organizations in this country; it has never been suggested until now that such an organization's provision of such services converts it into the alter ego of an organization to which it provides them.

Accordingly, it simply is not open to respondent to argue that the California Court of Appeal denied petitioner's stay application on the basis of conclusions about its relationship to other Scientology organizations, or upon a determination of the net assets available to other Scientology organizations.[8]

III. Respondent also suggests that the California Court of Appeal denied relief to petitioner because of purported evidence that petitioner no longer provides substantial

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sel John G. Peterson explained the nature and scope of the corporate reorganization and stated:

> Each of the transfers for each of the corporations were equal value for equal value, with both assets and liabilities in the transfers. The net worth of the Church of Scientology of California was not changed whatsoever by the reorganization itself, and in fact, its cash assets increased.

Declaration dated July 7, 1986, ¶9, previously submitted to the Court as Appendix B to Petitioner's Reply Memorandum to Respondent's Opposition To A Stay in *Church of Scientology of California* v. *Wollersheim*, No. A-271 (S.Ct.).

[8] Indeed, there was *no* evidence below as to the gross or net assets of any other Scientology church or organization.

religious services to its members,[9] but rather allegedly engages principally, if not entirely, in legal defense and "public relations" functions.

Respondent's argument not only is not supported by the record, but is irrelevant.

First, there was no evidence that petitioner's activities are restricted to legal defense and public relations. The assertion was specifically denied by petitioner's representative at trial (Tr. at 14,312), and the denial was uncontroverted.

Second, even if petitioner were engaged only in legal defense and public relations activities, it still would be entitled to the due process and equal protection rights not to be deprived of its statutory appeal by arbitrary and confiscatory application of a bonding requirement. Such fundamental requirements of fairness cannot be denied based upon the nature of the lawful activity in which an organization engages.

Third, provision of legal defense and public relations services to protect or vindicate associational rights itself lies at the core of First Amendment protections just as much as provision of religious services. *NAACP* v. *Alabama,* 357 U.S. 449, 460-61 (1958); *NAACP* v. *Button,* 371 U.S. 415, 428-31 (1963). And when such activities are provided on behalf of a religious movement, they become part of the very exercise of religious belief itself. *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943).[10]

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[9] There is no dispute that at the time of the events giving rise to the underlying lawsuit, petitioner provided religious services to its members. Indeed, respondent's judgment is based upon a jury's evaluation of the efficacy of those peaceful and voluntary religious services.

[10] Thus, when a church engages in "public relations", it engages in the proselytization of the church or religion, an activity pro-

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In *Henry* v. *First National Bank of Clarksdale,* 595 F.2d 291 (5th Cir. 1979) *cert. denied,* 444 U.S. 1074 (1980) the court held that the imminent destruction, by arbitrary application of a state bonding requirement, of an organization which engaged precisely in, *inter alia,* legal defense and public relations services threatened the organization's rights not only under the due process clause, but under the First Amendment as well. So here, petitioner's legal defense and public relations activities are protected by the First Amendment and, in the absence of a stay of execution or substantial reduction of bond, face imminent destruction by arbitrary application of the state bonding requirement.

IV. Respondent fails to explain why his interests would be impaired if this Court were to grant the petition or suspend action on it pending a decision in the *Texaco* case.[11] Respondent does not suggest that the appeal in the underlying state litigation does not present meritorious grounds for reversal of the extraordinary trial court judgment.

Respondent's assertion that he will suffer continuing prejudice if certiorari is granted and/or the stay is continued is belied by the fact that respondent himself obtained a thirty-day extension to respond to the petition in this Court. In addition, respondent also obtained a thirty-day extension to file his brief in the underlying state court appeal. Further, in applying for the state extension, respondent represented that the Church would not be prej-

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tected by both the religion and speech clauses of the First Amendment. *Murdock,* 319 U.S. at 108-10.

Similarly legal defense of churches is essential to protect the underlying religious activities protected by the First Amendment. *NAACP* v. *Alabama, supra,* 357 U.S. at 460-61; *NAACP* v. *Button, supra,* 371 U.S. at 431, 434-37.

[11] Petitioner suggested that the Court might wish to defer ruling on the Petition until the *Texaco* case is decided given the clear relationship of the issues in the two cases. Petition p. 11, n. 12.

udiced if it were granted. But the Church is not prejudiced only if a stay or an affordable bond is ordered; the delay of the underlying appeal resulting from respondent's delay further undercuts the effectiveness of the appeal. Moreover, respondent ignores the protection currently in place which preserves the assets of petitioner, subject to the trial court's control, and petitioner's offer to post a 5.1 million dollar bond if deemed necessary.[12] Respondent's interests are fully preserved and protected.

CONCLUSION

For the reasons stated above and in the petition for certiorari, petitioner's request for a writ of certiorari should be granted.

Dated: March 18, 1987
New York, New York

Respectfully submitted,

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[12] Indeed, since petitioner has only 5.1 million dollars available in unpledged assets, such a bond would offer as full and complete protection as enforcement of the judgment. This would also fully secure the compensatory portion of the judgment. Certainly, as to the remaining twenty-five million dollars assessed as punitive damages the state interest is vastly reduced. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (The "state interest extends no further than compensation for actual injury.")